In The
Supreme Court of the United States
October Term, 1975

No. 75-355

Bangor Punta Corporation, Nicolas M. Salgo, and David W. Wallace,
Petitioners,
v.
Chris-Craft Industries, Inc.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INDEX

INDEX—Continued

INDEX—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York on the issue of liability is reported at 337 F. Supp. 1128 and is reprinted in the Appendix at A-125-162.* The opinion of the court of appeals on

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* The Appendix volume in this Court is divided into sections A through F, and "A", "B", "C", "D", "E", and "F" page references are to the sections of that volume. The printed Appendix in the court of appeals is cited as "App.", except for the exhibit volumes which are cited "EV".

the issue of liability (A-1-124) is reported at 480 F.2d 341 (*"Chris-Craft II"*). The opinion of the district court on relief (B-43-80) is reported at 384 F. Supp. 507. The opinion of the court of appeals on relief (B-1-42) is reported at 516 F.2d 172 (*"Chris-Craft III"*).

Prior opinions of the district court (C-32-48) and the court of appeals (C-1-31) relating to an application for a preliminary injunction are reported at 303 F. Supp. 191 and 426 F.2d 569, respectively (*"Chris-Craft I"*). The opinions of the district court in the connected cases of *SEC* v. *Bangor Punta Corporation* (D-1-21) and *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.* (D-22-34) are reported at 331 F. Supp. 1154 and 337 F. Supp. 1147, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1975 (E-1-2), and a timely petition for rehearing was denied on June 9, 1975. (E-3, E-6) The Petition for a Writ of Certiorari was filed on September 5, 1975, and was granted on April 5, 1976. 96 S. Ct. 1505. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is there an implied private federal cause of action for damages in favor of one takeover aspirant against another—

(a) under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-6 thereunder, where the plaintiff neither bought nor sold the securities involved in the alleged violation, or

(b) under Section 14(e) of the 1934 Act, on account of an omission from a prospectus for an exchange offer, where the plaintiff is not suing as a target company shareholder, the class Section 14(e) was designed to protect?

2. If there are such implied causes of action, may the plaintiff recover damages where the defendants' actions involved no intent to deceive, manipulate, or defraud and no recklessness?

3. If there are such implied causes of action, is one takeover aspirant entitled to conclusive presumptions that (a) the other aspirant's exchange offer would not "have attracted any takers" but for an omission from its prospectus and (b) the other aspirant's violations decided the contest, despite findings by the district court that neither reliance nor causation had been proved?

4. If there are such implied causes of action, is a takeover aspirant that is neither induced to buy nor forced to sell shares of the target company entitled to a rescission measure of damages that compensates it for its own misjudgment of the worth of the target and for an unrelated market decline?

5. May a court of appeals that formulates a different measure of damages than that employed by the district court decide not to remand for a hearing, and instead fix the damages itself by using excerpts from the record created for the purpose of determining damages under the other measure of recovery, thereby increasing damages from $1.7 million to $25.8 million and increasing prejudgment interest from $600,000 to nearly $10 million?

STATUTES AND REGULATIONS INVOLVED

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b); Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e); Section 28(a) of the 1934 Act, 15 U.S.C § 78bb(a); Act of June 25, 1948, c. 646, 62 Stat. 963, 28 U.S.C. § 2106; Rule 10b-5 under the 1934 Act, 17 C.F.R. § 240.10b-5; and Rule 10b-6 under the 1934 Act, 17 C.F.R. § 240.10b-6, are set forth in an Addendum to this Brief.

STATEMENT OF THE CASE

This case arises out of a "sophisticated and hard fought" (A-127) contest for control of Piper Aircraft Corporation ("Piper"). The "winner," Bangor Punta Corporation ("BPC"), was found to have committed two technical and unintentional violations of the 1934 Act during the contest. These missteps were presumed (but not shown) to have denied the "loser," Chris-Craft Industries, Inc. ("CCI"), a fair chance to compete for control. BPC was held liable—jointly and severally with two of its directors, three members of the Piper family and Piper's financial adviser—to pay CCI, which still owns 43% of Piper, nearly $36 million (including prejudgment interest). The judgment equals approximately the entire net shareholders' equity of Piper and far exceeds what CCI would now have if it had won.

1. The Contest for Control of Piper

CCI began acquiring Piper shares in December 1968. By January 23, 1969, CCI had acquired approximately 203,000 Piper shares (12.4%) through transactions on the New York Stock Exchange and through a private purchase from an institutional investor. Table at p. 9, Item 1. On that date CCI publicly announced a cash tender offer for 300,000 Piper shares at $65 per share.

Piper's management decided to oppose CCI's tender offer. On January 27 and 28, 1969, Piper sent letters to its shareholders advising them not to tender. On January 29, 1969, Piper announced an agreement to sell 300,000 unissued Piper shares to Grumman Aircraft Engineering Corporation. (The agreement was terminated on March 17, 1969.) These letters and the announcement were later held to violate Section 14(e) and are the basis for the liability of the individual Piper family defendants. (B-5, 9)

Despite Piper's opposition, CCI's January tender offer was successful (A-12), bringing CCI 304,000 shares. Table, Item 2. CCI made additional cash purchases of Piper shares during its tender offer, and by February 3, 1969 it owned a total of 547,106 Piper shares (33%), bought at a cost of about $35 million. (A-128) With "[i]ts cash resources . . . virtually exhausted" (A-114), CCI announced late in February, after the close of its cash tender offer, its intention to make an exchange offer to Piper shareholders. (A-12)

Between January and mid-April 1969, BPC was twice approached by Piper's investment adviser, the First Boston Corporation ("First Boston"), about the possibility that BPC might acquire control of Piper. But it was not until after CCI's tender offer had been successfully completed (and the Pipers' alleged violations had been committed) that BPC first met with any Piper official. Serious negotiations between BPC and the Piper family did not begin until late in April, by which time CCI owned 33.8% of Piper. Table, Item 3.

On May 8, 1969, BPC agreed to purchase the entire interest of the Piper family, about 31% of the outstanding shares, for a package of BPC securities valued by First Boston at $70-$72 per Piper share. Table, Item 4.

BPC also promised to use its best efforts to acquire a majority of Piper's shares by offering all Piper shareholders a package of BPC securities with a value of at least $80 per Piper share, and, if successful in that effort, to give the Piper family (in BPC securities or in cash) the difference between the value of the securities they had received and $80. (A-14-15)

A few days after purchasing shares from the Piper family, BPC was offered a total of 98,600 Piper shares at approximately $80 per share by two institutional investors. BPC accepted the offers, bought the shares in off-exhange transactions, and promptly disclosed them to the public on May 16, 1969. During the following week BPC purchased an additional 21,600 Piper shares from another institutional investor in another off-exchange transaction, which was also promptly disclosed to the public. (A-16; App. 374A; EV 1092) After making these cash purchases (totaling 7% of the Piper stock, see Table, Item 5), BPC had a 4% lead over CCI with almost 30% of the Piper shares still in public hands. These purchases were made with the advice of counsel that they were lawful (App. 1644A-45A) and were found to have had no market effect. (A-152) Nevertheless, the purchases were later held to have been in technical violation of Rule 10b-6, in the first reported administrative or judicial application of that rule to the purchase of target company shares.

CCI's exchange offer began in mid-May. The 1969-70 stock market decline intervened, however, and the prices of CCI's securities, which it was offering in exchange, declined rapidly, making the exchange offer increasingly unattractive. CCI renewed the offer several times but never supplemented the original package of securities to make it competitive with BPC's prospective offer. The

result was that CCI's offer never attracted even the minimum number of shares (80,000) that CCI had set as a condition of accepting any of the Piper shares tendered. The offer was withdrawn on July 24. (A-17) Table, Item 6.

On July 18, 1969, BPC's exchange offer became effective. It remained open until July 29, attracting 110,802 Piper shares, all of which BPC accepted. CCI in the meantime had registered another exchange offer, which opened on July 24 and closed on August 4, attracting 112,089 Piper shares. The district court found that during the period in which the offers overlapped, BPC's package had a market value ranging between $79.93 and $73.37; by contrast, CCI's package ranged between $75.50 and $63.25. (A-140 n. 10) At the close of the competing exchange offers, BPC retained a 4% lead with 15% of the stock still in the hands of public stockholders. Table, Items 7, 8. The prospectus that was used in BPC's exchange offer was later held to have been unintentionally in error, on a matter that did not affect the value of BPC's offer. (A-140)

At this point, neither aspirant had control of Piper. The district court specifically found that, as late as August 19, 1969, control was available to either BPC or CCI, and accordingly denied CCI's request for preliminary injunctive relief against future purchases by BPC, saying:

> Neither party has gained control of Piper, and both are still in a position to do so. (C-47)

The court of appeals en banc affirmed this conclusion in *Chris-Craft I* and went on to say that in mid-August 1969, CCI was not "at any real disadvantage" in the contest:

> [W]e conclude that the district court did not err in refusing to enjoin the continued solicitation of stock by Bangor Punta. At that time Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage. (C-9)

In short, after the exchange offers, control was available in the market to the higher bidder. CCI spent about $2 million to purchase 29,200 Piper shares, giving it 42%; it then voluntarily "withdrew from the battle." (B-7) BPC, with its superior financial resources, purchased an additional 100,614 Piper shares for over $7 million, reaching a total of 51% on September 5, 1969. Table, Items 9, 10. BPC then stopped making purchases because it had a majority. Apparent control of Piper had, appropriately, gone to the higher bidder.

SUMMARY OF THE CONTEST FOR CONTROL

Total Piper Shares Outstanding 1,644,790

Acquisition of Piper Shares					Cumulative Percentage of Piper Shares Owned		
Buyer	Type of Acquisition	Dates	No. of Shares	% of Total	CCI	BPC	Public
1. CCI	cash purchases	12/30/68-1/22/69	203,700	12.4%	12.4%	0%	87.6%
2. CCI	cash tender offer	1/23/69-2/ 3/69	304,606	18.5%	30.9%	0%	69.1%
3. CCI	cash purchases	1/23/69-4/ 7/69	47,900	2.9%	33.8%	0%	66.2%
[MAY 8: BPC ENTERED CONTEST]							
4. BPC	sale by Piper family	5/ 8/69	501,090	30.5%	33.8%	30.5%	35.7%
5. BPC	cash purchases	5/14/69-5/23/69	120,200	7.3%	33.8%	37.8%	28.4%
[MAY 22: THIS LITIGATION BEGAN]							
6. CCI	exchange offer	5/15/69-7/24/69			WITHDRAWN		
7. BPC	exchange offer	7/18/69-7/29/69	110,802	6.7%	33.8%	44.5%	21.7%
8. CCI	exchange offer	7/24/69-8/ 4/69	112,089	6.8%	40.6%	44.5%	14.9%
9. CCI	cash purchases	8/12/69-8/18/69	29,200	1.8%	42.4%	44.5%	13.1%
[AUGUST 19: PRELIMINARY INJUNCTION DENIED; CCI "WITHDREW FROM THE BATTLE"]							
10. BPC	cash purchases	8/ 8/69-9/ 5/69	100,614	6.1%	42.4%	50.6%	7.0%

2. The Litigation

a. *The Initial Decisions*

This action was commenced on May 22, 1969. In its first amended complaint, CCI alleged that BPC's private purchases of 120,200 Piper shares in May 1969 violated Rule 10b-6, which prohibits a person participating in the distribution of a security from acquiring that security or any right to acquire that security. CCI's theory was that BPC, having announced its intention to offer BPC securities in exchange for Piper shares, was engaged in the distribution of BPC securities; that Piper stock represented a right to acquire BPC securities in the exchange offer itself; and that BPC was therefore prohibited by Rule 10b-6 from purchasing Piper stock. The district court held that Rule 10b-6 did not apply to BPC's purchases, since purchases of Piper stock could not have the prohibited effect of artificially stimulating the market value of the BPC securities in distribution. (C-45) CCI's request for a preliminary injunction preventing BPC from purchasing additional Piper shares was denied.*

In *Chris-Craft I* the denial of the preliminary injunction was affirmed. However, a majority of the court of appeals disagreed with the district court's interpretation of Rule 10b-6, and held that purchases of a target com-

* CCI also alleged in its first amended complaint that the press release issued by Piper and BPC on May 8, 1969, which included the statement that BPC intended to offer "Bangor Punta securities to be valued in the judgment of The First Boston Corporation at not less than $80 per Piper share," violated Section 5(c) of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77e(c), by going beyond Rule 135, 17 C.F.R. § 230.135, which specifies the information that may be published before the filing of a registration statement. Since the statement was entirely accurate, the court of appeals, like the district court, found that CCI had not been damaged by the release. (A-42-43) This issue is no longer involved in this case.

pany's stock by a company that plans to make an exchange offer for that stock constitute purchases of rights to acquire the maker's own stock within the meaning of the rule. Chief Judge Lumbard dissented vigorously, arguing that "the majority would stretch the wording of [Rule] 10b-6 beyond anything that courts, commentators, and—in published actions—the [Securities and Exchange Commission] had considered included until this case." (C-28) The case was remanded to the district court for further proceedings to determine whether an exemption was available.

b. *The Decisions on Liability*

After remand, CCI filed a second amended complaint, adding to its Rule 10b-6 charge the allegation that the prospectus for BPC's July 1969 exchange offer had failed to disclose an alleged agreement to sell BPC's shares of the Bangor and Aroostook Railroad ("BAR") at a price lower than BPC's book value for that investment. CCI claimed that because of this alleged omission, the prospectus violated Section 14(e) of the 1934 Act. Shortly thereafter, the Securities and Exchange Commission ("SEC") brought an action against BPC based on the same alleged omission. The SEC sought an injunction requiring BPC to offer rescission to the former Piper shareholders who had exchanged their shares, plus a general injunction against future securities law violations.

The CCI and SEC actions were tried together. The evidence established that at the time of the exchange offer BPC had *not* agreed to sell its investment in the BAR to anyone. BPC had received an offer for the BAR, which it had considered; but BPC had "decided to table the entire matter" (D-8) pending completion of an investigation of the legal, accounting and tax implica-

tions of various forms of disposing of the BAR, particularly the financial consequences of a sale of stock as compared to a sale of assets. The evidence further established that counsel for BPC and First Boston had reviewed the status of the BAR with BPC and First Boston executives. (A-48; App. 1657A-59A) Since there had been no decision to sell and since the financial effect of any disposition of the BAR would depend on the form of the transaction (which was still being studied), no one suggested that disclosure of possible disposition was required. BPC's independent accountants were also fully aware of the negotiations concerning the BAR when they permitted the use of their opinion in the exchange offer prospectus. (App. 1759A-61A; EV 87, 89) BPC finally agreed to a sale of its BAR stock for cash on October 2, 1969, more than two months after the close of BPC's exchange offer. (D-6-13)

In the SEC case, the district court ruled that the evidence "unequivocally negate[d]" (D-11) the existence of any agreement to sell the BAR and that BPC had not "consciously concealed, deferred or refrained from going forward with [the] offer [for the BAR] in order to circumvent disclosure" in the exchange offer prospectus. (D-12) There was at the relevant time no "reasonable probability" of a sale. (D-13) However, the court advanced a theory neither the SEC nor CCI had relied on: that the offer of $5 million for BPC's interest in the BAR made the carrying value of $18.4 million on BPC's balance sheet "obsolete." (D-14) Applying a "standard of materiality" that turned on whether "a reasonable stockholder of Piper might have hesitated to" accept BPC's exchange offer if he had known of the possible disposition of the BAR (D-15), the district court held that although BPC did not "intentionally or purposefully mislead" any-

one (D-14), the prospectus was unintentionally misleading because of the failure to mention the offer. In order to "correc[t] [the prospectus] for those to whom it related" (A-143), the district court ordered BPC to offer rescission to all Piper shareholders who had accepted its exchange offer.* The court denied the SEC's request for an injunction against future violations because it found no "bad faith" on the part of BPC. (D-16-17)

In CCI's case the district court, after trial, dismissed the complaint without reaching the question whether CCI had standing to sue BPC under Section 14(e). With respect to CCI's claim based on the BAR omission, it repeated the conclusion it had reached in the SEC case: the prospectus was "unintentionally in error" (A-143) because of a "mere negligent omission." (A-148) Therefore, CCI had failed to prove any "form of scienter." (A-144) The district court also held that CCI had failed to show any "causal relation between the deficiency and the harm complained of." (*Id.*)

CCI's case (but not the SEC's) also involved the alleged Rule 10b-6 violation. As to that, the evidence showed that BPC's in-house and outside counsel had advised it that the rule did not apply to purchases of Piper stock by BPC under the circumstances. (App. 1644A-46A) BPC's counsel knew that in a May 5, 1969 release the SEC had circulated for public comment a proposed new Rule 10b-13 to deal explicitly with purchases of a target company's stock by a tender offeror. Although the new rule would not become effective until November 1969, the SEC's May release had asserted that the new rule was "in effect a codification of existing interpretations under Rule 10b-6." But not one such published interpretation,

* The rescission offer was made. It was not accepted by any former Piper shareholder.

administrative or judicial, was ever found. (C-28-31, 44-46)

The district court, bound by *Chris-Craft I*, found that BPC's cash purchases in May were "technical" (A-149) violations of Rule 10b-6, though "well within the spirit" (A-151) of one of the many exemptions from the rule. It also found that the purchases—all in large blocs, all off-the-exchange, and all promptly announced—had not "acted to produce or heighten a stimulating effect on the market" (A-152), and had not misled CCI or any Piper shareholder. (A-151) The district court also found that there was "no basis for concluding that, absent Bangor Punta's acquisition of these blocks, Chris-Craft would have achieved its goal of control." (A-150)

On appeal (*Chris-Craft II*), the court of appeals reversed and remanded.* It held that CCI, as one aspirant for control of Piper, had implied causes of action for damages against BPC, another aspirant, under both Rule 10b-6 and Section 14(e). The court of appeals acknowledged that BPC's violations were technical and not made in bad faith. (A-37, 47, 97-100, 117-123) It also acknowledged that there was no evidence that CCI could ever have gained control of Piper, even if the defendants had not violated the law. (A-56, 66) Nevertheless, the court of appeals held that the violations would be legally presumed to have injured CCI by denying it a "fair opportunity to compete for control." (A-60)

The court of appeals then directed the district court to enjoin BPC from voting either bloc of Piper shares for five years, so that BPC would (as it does today) have the power to vote only 37% of the shares

* The district court's decision in the SEC action—ordering BPC to offer rescission but denying the broad injunction the SEC sought —was affirmed. (A-94-95)

against CCI's 42%. In addition to this injunction and the rescission offer that was ordered in the SEC case, the court of appeals directed that the district court determine the money damages CCI suffered by being deprived of a "fair opportunity to compete for control" of Piper by BPC and the other defendants.

c. *The Decisions on Damages*

On remand, the district court heard and evaluated extensive expert testimony on the value of CCI's lost opportunity. After analyzing the factors that give value to control, the district court found that the value of control would be no more than 10% over the fair market value of Piper stock on September 5, 1969, the day BPC acquired 51% of Piper. The fair market value on that date, the district court found, was $48 per share; the value of control was therefore $4.80. Since CCI lost at most an opportunity to gain control, its damages were "generously valued" at $2.40 per Piper share, for a total of $1,673,988. (B-70) In addition, the district court awarded prejudgment interest, which totaled $599,011. (B-76-79)

On appeal (*Chris-Craft III*), the court of appeals deemed this judgment for more than $2 million "quite insubstantial" (B-17), and took the following steps to enlarge it:

First, the court of appeals disregarded the fact that CCI's injury was a supposed interference with its opportunity to gain control of Piper and held that the measure of damages was the difference between the historical cost of CCI's Piper shares and the price at which CCI could theoretically have sold the stock by a public offering in a severely depressed market five months after BPC acquired control. It did so even though (a) CCI was

not induced to buy a single Piper share by BPC and retained every share of Piper it had bought during the contest; (b) the historical cost of CCI's Piper shares greatly exceeded their value (as found by the district court) at the time the court of appeals deemed relevant; (c) CCI had not proved that BPC would have lost or that CCI could have won control under any circumstances; and (d) CCI would have suffered precisely the same decline in the market value of its Piper shares had it obtained the control it allegedly was unfairly denied.

Second, the court of appeals decided that it would itself determine damages without a remand, and did so on the basis of selected portions of the testimony and report of a CCI expert who was not credited by the trial judge. The court made plain errors in calculating both the cost and the selling price and directed that judgment be entered against all defendants, jointly and severally, for $25,793,365. (B-21-32) It then merely "affirmed" the district court's decision to award prejudgment interest; but because of the redetermination of damages, this "affirmance" increased the actual interest award from $599,011 to approximately $10 million.

The result is a crushing $36 million judgment that provides a massive "windfall" (A-145) for the loser in the takeover contest, unfairly penalizes BPC and its directors for technical good faith violations, and renders the Williams Act a lethal weapon to deter competition for corporate control—a result Congress took "extreme care" to avoid. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975).

SUMMARY OF ARGUMENT

The judgment against BPC and its directors was based on two alleged violations. The first was a "technical" (A-149) violation of SEC Rule 10b-6 that the district court found not to have "such substance as to merit serious consideration . . . as a basis for money damages." (A-150) The second was an omission from BPC's exchange offer prospectus that the district court found to involve no "intent to mislead" (A-143) or "bad faith" (D-14) and to have no "causal relation" to the injury CCI claimed to have suffered. (A-144)

CCI neither bought nor sold the BPC securities involved in the alleged violation of Rule 10b-6. As for the alleged Section 14(e) violation, CCI was not the target of BPC's exchange offer, was not misled by the prospectus, and is not suing as a member of the shareholder class that Section 14(e) was intended to protect or for harm that Section 14(e) was intended to redress. CCI's only claim is that the two violations during BPC's quest for Piper stock injured CCI because CCI was seeking Piper stock at the same time. CCI did not, however, prove that BPC's violations caused it to lose its quest for control. CCI "withdrew from the struggle" while control was still available to either aspirant in the marketplace. (A-18, A-114-16, C-47) CCI suffered a loss on the Piper shares, just as BPC did, because both bought just before a sharp decline in the stock market and particularly in the share prices of general aviation companies including Piper.

The court of appeals bailed CCI out. Invoking a policy of "vigorous enforcement through private litigation" (A-22), it created damage actions in favor of a plaintiff the statute was not designed to protect; defined "scienter"

to include mere knowledge of an omitted fact, even in good faith; conclusively presumed that BPC's exchange offer would not "have attracted any takers" (A-60) without the omission; and further presumed, in the face of contrary findings of fact, that the two violations were what cost CCI its opportunity for control of Piper. Then, ignoring the statutory limitation to "actual damages on account of the act complained of," 15 U.S.C. § 78bb(a) (1970), the court of appeals awarded CCI an amount fifteen times as great as the value of the "opportunity" the court of appeals presumed it had lost.

1. The Implied Causes of Action

The court of appeals interpreted the federal securities laws so as to create two new implied federal causes of action for damages in favor of CCI. One was implied under Section 10(b) and Rule 10b-6 even though CCI was neither a purchaser nor a seller of the securities involved. *Compare Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). The other was implied under Section 14(e) even though CCI was not a member of the class for whose "especial benefit" Section 14(e) was enacted, *compare Cort* v. *Ash*, 422 U.S. 66 (1975), and did not suffer the type of harm Section 14(e) was designed to redress. *Compare Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975).

a. *Section 10(b) and Rule 10b-6*

The court of appeals ruled that BPC had violated Section 10(b) and Rule 10b-6 in connection with a distribution of BPC securities. It then created an implied federal cause of action in favor of CCI for damages even though CCI neither bought nor sold the BPC securities in connection with which the violation occurred. This

ruling is inconsistent with the subsequent holding of this Court in *Blue Chip Stamps* that the plaintiff must purchase or sell the securities involved in order to have an implied cause of action for damages under Section 10(b). *Blue Chip Stamps* involved Rule 10b-5 rather than Rule 10b-6, but this Court's decision was based on the words "in connection with the purchase or sale" in Section 10(b) itself, words that necessarily limit the scope of both rules.

Subject to many exemptions, Rule 10b-6 prohibits a corporation that is engaged in a distribution of its securities from simultaneously buying the same securities or "rights" to buy such securities. Its objective is to protect purchasers of the securities in distribution from paying a price that has been artificially inflated by the issuer's own trading. *Weitzen* v. *Kearns*, 271 F. Supp. 616, 623 (S.D.N.Y. 1967). BPC was held to have violated the rule when, after announcing its intention to offer to exchange BPC securities for Piper stock, it purchased Piper stock for cash. Because of BPC's own exchange offer, the Piper stock itself was deemed to constitute "rights" to acquire the BPC securities.*

This case illustrates why *Blue Chip Stamps* was correct. CCI never bought or sold the BPC securities whose "distribution" Rule 10b-6 was designed to regulate. There is no proof that BPC's purchases affected the price

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* This new and strained reading of Rule 10b-6 was hotly disputed. The main point was that BPC's purchases here were consistent with its announced intention to acquire as much Piper stock as possible, not (as in the normal case) directly contrary to an announced intention to sell. See the dissenting opinion of Chief Judge Lumbard at C-28-31. The only plausible market effect of buying Piper shares would be to raise the price of Piper stock. BPC obviously did not want to do that since it would make BPC's exchange offer seem less attractive. (C-45) In any event BPC's purchases were found not to have had any market effect. (A-151)

at which any security was purchased or sold by CCI. CCI's only claim is that it also wanted Piper stock. *Blue Chip Stamps* plainly and properly forbids making the purchaser of a security in a technically unlawful transaction liable to a plaintiff whose only claim is that it was seeking securities of the same class.

b. *Section 14(e)*

The court of appeals created for CCI, a takeover aspirant, an implied right to seek damages under Section 14(e), which was enacted to protect target company shareholders. This ruling, wrong in principle, has the practical effect of penalizing the very people Congress wanted to protect—the Piper shareholders who accepted BPC's exchange offer and now hold BPC securities.

Federal courts have sometimes created new implied damage remedies under federal statutes, but only "[b]ecause the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall . . . ." *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 202 (1967). The statute must "create a federal right in favor of the plaintiff," *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), who must allege "harm . . . redressable under its provisions." *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975). These well established principles follow both from the general law of torts and from the inherent limitations on the federal courts.

Section 14(e) is a part of the Williams Act. That Act was designed to assure the shareholders of a target com-

pany accurate information with which to respond to an offer for their shares. Takeover aspirants, among others, were given the duty of obeying the disclosure requirements; there is no evidence that they were intended to be among the statute's beneficiaries. The words of the section itself contemplate only statements aimed at security holders. The committee reports on the Williams Act emphasized that it was a disclosure statute designed to provide material information to the target company shareholders; they say nothing about protecting offerors. Senator Williams, introducing the legislation, said that the law was "for the benefit of shareholders" and balanced that benefit against the burdens imposed on takeover aspirants. *See* p. 40, *infra.* The testimony at congressional hearings was that offerors "do not need any additional protection." *See* p. 42, *infra.* This Court in *Rondeau* recognized that "[t]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information . . . ." 422 U.S. at 58. Other courts have consistently taken this view. The fact that Section 14(e) protects target shareholders from misleading solicitations "in opposition to" a tender offer, if relevant at all here, reinforces this conclusion. Congress wanted shareholders to receive accurate information from both pro- and anti-takeover forces. There is no evidence whatever that Congress meant to protect (much less to provide a cause of action for damages to) the offeror, which can fend for itself.

CCI falls well outside the class "for whose especial benefit the statute was enacted." *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, 39 (1916), quoted and reemphasized in *Cort*, 422 U.S. at 78. CCI is not a Piper share-

holder misled into tendering,* nor is it a Piper shareholder misled into not tendering, nor is it complaining of any injury done to Piper that might derivatively affect that company's shareholders. CCI sought damages solely on the ground that it, like BPC, was seeking Piper shares. An injury to this interest simply is not "redressable under its [the Williams Act's] provisions." *Rondeau*, 422 U.S. at 60. The fact that it might be redressable on a proper showing in state courts under state tort law does not alter this conclusion, as Judge Timbers thought (A-30); it reinforces it. *Cort*, 422 U.S. at 84-85.

So-called "standing" cases that involve only injunctive relief are not relevant here. Injunctions requiring the defendant to carry out a policy established by Congress can be afforded broadly even to those whose interests Congress did not specifically intend to protect, because "the fact is that one injunction is as effective as 100 and, concomitantly, that 100 injunctions are no more effective than one." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 261 (1972). Damages by contrast can have a multiplicative effect, often on innocent shareholders or even (as here) on the very shareholders (those who exchanged Piper shares for BPC securities) intended to be the beneficiaries. Accordingly, if a particular injury is to be compensable in damages, the federal courts "should insist upon a clear expression of a congressional purpose to make it so." *Id.* at 264. The only "clear expression"

* The Piper shareholders who were the intended beneficiaries of Section 14(e) have received the full measure of its protection. Because the BPC prospectus was found "unintentionally in error," the district court in the SEC action ordered BPC to offer rescission to the tendering shareholders, and BPC did so. None accepted. The present case concerns whether, in addition, BPC owes massive damages to CCI, the competing offeror.

from the language, history and purpose of the Williams Act is that target company shareholders, not tender offerors, were the intended beneficiaries.

2. Scienter

In *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375 (1976), this Court held that a cause of action for damages will not lie under Section 10(b) and Rule 10b-5 in the absence of scienter, defined as "intent to deceive, manipulate, or defraud." *Id.* at 1381. The Court left undecided whether reckless behavior could ever be deemed "a form of intentional conduct." *Id.* at 1381 n.12. BPC's conduct in the present case does not meet the *Hochfelder* test.

The district court characterized the Rule 10b-6 violation as merely "technical" (A-149) and within the "intent" of one of the exemptions from the rule. (A-151) With respect to the BAR omission the district court found as follows:

> I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its directors intend to gain an advantage over Chris-Craft by the nondisclosure in the contest being waged for control of Piper. There was no purposeful connection between the nondisclosure and the contest for control. In other words, the nondisclosure was not prompted by an improper purpose. However, absence of bad faith does not excuse the failure to state facts necessary to make the facts stated not misleading. (D-14)

The court of appeals expressly accepted the district court's findings. (A-47) But, using the term "scienter"

in a manner quite inconsistent with *Hochfelder*, the court of appeals ruled that mere knowledge of an omitted fact is enough. Judge Timbers said in the main opinion:

> In sum, and put as simply as possible, the standard for determining liability under § 14(e) on the part of a person making a misleading tender offer, or a responsible officer of a corporation making such . . . an offer, is whether plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort. (A-36-37)

Judge Mansfield said almost the same thing. He thought only "*some degree of awareness*" was necessary. (A-105, emphasis in original) Without discussion, the court of appeals apparently applied the same test to the Rule 10b-6 violation. If scienter is satisfied by mere awareness, without more, then the scienter requirement in effect would be abolished.

BPC's conduct obviously satisfied the "awareness" test. BPC knew it was buying Piper stock for cash in May 1969, although it "did not then know of any rule or interpretation precluding the transactions," (C-22, Lumbard, C. J., dissenting) and, far from intending to deceive anyone, it fully disclosed them publicly and in a Schedule 13D filed with the SEC at the time they were made. BPC discussed disclosure of the BAR offer with its counsel and its financial advisors and concluded that disclosure would be premature. If BPC's judgments are now deemed wrong, it nevertheless plainly did not have the "intent to defraud, manipulate, or deceive" required by *Hochfelder*. Recklessness was neither charged nor

found and is precluded by the findings that were made. In any event, recklessness is insufficient to support the imposition of liability unless it amounts to intentional fraud.

The same standard of scienter should apply in private actions under Rule 10b-6 or Section 14(e) as in those under Section 10(b) and Rule 10b-5. With regard to Rule 10b-6, the statute underlying that rule is the same as the one underlying Rule 10b-5, so *Hochfelder* plainly controls. Section 14(e) is worded slightly differently, and incorporates language from Rule 10b-5(2) not found in Section 10(b) itself. While this Court noted in *Hochfelder* that these words taken by themselves do not explicitly resolve the scienter question, any doubt left by the language of Section 14(e) is resolved by its history. Both Section 10(b) and Rule 10b-5 are antifraud provisions. Section 14(e) was based on these provisions. The court of appeals in this case thought it was applying "the principles developed under Rule 10b-5" (A-34) to determine what form of scienter, if any, should be required under Section 14(e). Every other court that has considered the issue has started from the same premise. There is no reason to assume that when Congress borrowed the language of Rule 10b-5 and went on to describe Section 14(e) in the committee reports as a "fraudulent transactions" section, Congress was operating under the mistaken impression that Rule 10b-5(2) actions did not require "intent to deceive, manipulate, or defraud." Indeed, *Hochfelder* precludes such an assumption. In adopting a lesser standard of scienter, the court of appeals failed to anticipate *Hochfelder* and disregarded the logic of the interrelated and interdependent express remedies provisions of the securities acts.

3. Reliance and Causation

The district court found that CCI had not established "a nexus between the violations it charges and the damages it claims to have suffered." (A-147) As to the Section 14(e) claim, it found "no proof that a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta." (A-145) As to the Rule 10b-6 claim, it found no basis for concluding that even absent BPC's cash purchases CCI would have gained control. (A-150)

The court of appeals agreed (A-55-56) but ruled that under *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), and "to encourage the vigorous enforcement of the securities laws through shareholder suits" (A-57) it was required to make two critical presumptions on CCI's behalf: first, even assuming "BPC's offer was superior to that of CCI, taking into account the BAR loss" (A-60), that "BPC's exchange offer would not "have attracted any takers" (A-60) without the BAR omission; and, second, that BPC's missteps caused CCI to lose control of Piper (the injury for which it was compensated) even though it was not proved that CCI "would have obtained a controlling position in Piper" (A-56) under any circumstances.

These rulings are both an erroneous reading of this Court's holdings and bad law. In *Mills*, suit was brought by shareholders challenging a proxy solicitation by management from which a material fact was omitted. The Court ruled that there was a violation because the omission itself denied the shareholders "fair corporate suffrage." 396 U.S. at 381. They were entitled to a proper

proxy regardless of any showing of what they would have done. The Court specifically found "no justification" for any presumption as to how the shareholders would have voted absent the omission. *Id.* at 382 n. 5.

In the present case, the district court ordered BPC to offer rescission to every shareholder who exchanged. That order, which BPC followed, is the most that *Mills* can demand and the only remedy to which CCI would be entitled even if it had established standing and scienter. The court of appeals, however, invoked *Mills* for a further step that *Mills* never envisioned: it gave CCI, a third party, a rule of law conclusively establishing that BPC's offer would not in fact "have attracted any takers" if the negotiations had been disclosed. (A-60)

The court of appeals then took an even broader leap. It simply ignored the district court's (C-47) and its own (C-9) conclusion that CCI was "still in a position" to gain control of Piper and was not "at any real disadvantage" *after* all the events at issue and conclusively presumed that BPC's missteps had caused CCI's defeat. As Judge Mansfield noted, however, "it was BPC's cash purchases in the open market of 100,614 shares, as compared with CCI's capacity to buy only 29,200 shares, that won control for BPC." (A-116)* The result reached by the court of appeals is as if, in the *Mills* case, the Court had created an irrebuttable presumption that the merger *would* have been rejected and had awarded damages to a competing suitor seeking a different merger with the target.

In *Rondeau,* this Court noted that "*Mills* could not be plainer in holding that the questions of liability and re-

* These purchases, Item 10 on the Table, were wholly lawful.

lief are separate in private actions under the securities laws, and that the latter is to be determined according to traditional principles," 422 U.S. at 64. CCI obviously should not have been awarded damages based on the difference between winning and losing the contest "in the absence of evidence establishing a reasonable probability that its defeat and damage were connected with the claimed violations." (A-145)

4. Damages

Section 28(a) of the 1934 Act prohibits any plaintiff from recovering more than its "actual damages on account of the act complained of." Since the court of appeals in *Chris-Craft II* had defined the injury as BPC's alleged interference with CCI's opportunity to compete for control of Piper, the district court first found the value of control. This value was found after an extensive hearing to be $4.80 per share. The district court discounted this figure to $2.40 because what was taken was not control itself but a highly uncertain "opportunity" to gain control. (B-57-70)

In *Chris-Craft III*, the court of appeals ignored its previous definition of the injury and adopted an indemnification measure of damages that increased damages more than fifteen-fold to $37 per share. The new formula was

> . . . the difference between the price CCI paid for its Piper stock . . . and the price it could have obtained for it through a public offering after BPC unlawfully acquired control . . . . (B-31)

The court of appeals tried to force this new formula to serve as a measure of the actual decline in the value of

CCI's holdings caused by BPC's obtaining a majority. The results are, at best, tens of millions of dollars wide of the mark.

The court of appeals first found the per-share value of a bloc of Piper stock that carried with it the chance of gaining control to be $64, based on CCI's supposed cost, despite the district court's finding that even a control bloc was worth only $52.80 per share at the relevant date. The court of appeals then found the per-share value of a minority bloc to be $27 per share, based on an estimated selling price five months after BPC obtained a majority. The SEC pointed out that this—

> appears to compensate Chris-Craft for a loss caused by a post-injury decline in the market value of Piper stock of approximately $15 per share—a loss that Chris-Craft would have sustained even if [BPC] had not violated the securities laws and, indeed, even if Chris-Craft itself had succeeded in the contest for control . . . . *Brief for the United States as Amicus Curiae on Petitions for Certiorari* at 23 n.14.

In this manner the court of appeals reached the remarkable conclusion that the value of control was $37 per share ($64 minus $27) for a stock that the court thought was itself worth only $27 per share.

The court of appeals then assessed damages based on the full $37 per share, making no allowance at all for the fact that what CCI lost was, at the very most, an opportunity to compete for control against a vigorous opponent. Even the SEC has acknowledged that this risks "substantial overcompensation of the defeated contestant," which lost only its "expectancy." *Id.* at 22.

What the court of appeals really did, as the cases it cited show, was to use a rescission measure of damages even though CCI was neither induced to buy nor forced to sell. The effect was to make BPC insure CCI against CCI's own misjudgment of Piper's worth and against a steep market decline. This was plain error. In a contest for control where the "act complained of" is denial of the opportunity to gain control, the "actual damages" under Section 28(a) must be measured by the value of control, "discounted by the likelihood that the defeated contestant would have lost the control contest" anyway. *Id.*

5. Due Process

Even if the court of appeals' second damage formula were right, it was error for the court to calculate damages itself, on the basis of selected excerpts from a record made on the old theory, without giving the parties an opportunity to present evidence or argument on the new theory. Had BPC been given the chance, it could, for example, have offered proof challenging the critical but unanalyzed assumptions that CCI would have had to register its non-control bloc with the SEC and that this would have taken five months of steady market decline. Such matters became critical after *Chris-Craft III* because every one-dollar difference in the presumed cost or hypothetical sale price of a Piper share changes the total judgment against BPC and its directors by $1 million. This denial of BPC's fundamental rights was compounded by the court of appeals' "affirmance" of the award of prejudgment interest. Since the court of appeals had itself increased the underlying damages fifteen-fold, this "affirmance" enlarged the interest component alone from $600,000 to nearly $10 million.

ARGUMENT

I. There Is No Implied Private Federal Cause of Action for Damages, Under Either Rule 10b-6 or Section 14(e), in Favor of One Takeover Aspirant Against Another.

The court of appeals created two new implied federal causes of action for damages, one under Rule 10b-6 and one under Section 14(e), in favor of one takeover aspirant against another. In so doing, the court disregarded controlling statutory language, accorded standing * to a class of plaintiffs Congress never intended to benefit, and overrode important and carefully drafted limitations on the express civil damage remedies in the same body of federal laws.

This Court has, in cases that are controlling here, repeatedly ruled against this kind of automatic provision of implied federal remedies. *See Cort* v. *Ash*, 422 U.S. 66 (1975); *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974); *cf. Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). The Court has, instead, demanded a careful examination of the language, his-

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* This case does not present an issue of "standing" in the constitutional sense. *Compare Simon* v. *Eastern Ky. Welfare Rights Organization*, 44 U.S.L.W. 4724 (U.S. June 1, 1976); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Baker* v. *Carr*, 369 U.S. 186 (1962). The question is not whether CCI has a sufficient interest in the injury it alleges but whether Congress intended to create a private federal damage remedy, under Section 10(b) or Section 14(e) of the 1934 Act, for the kind of injury CCI alleges it suffered.

tory, and purpose of a statute before concluding that particular harm is "redressable under its provisions" in an implied private action in a federal court. *Rondeau,* 422 U.S. at 60. That examination leads to a reversal here.

A. *CCI Has No Cause of Action for Damages Under Section 10(b) and Rule 10b-6 Because It Neither Purchased Nor Sold the Securities in Question.*

Rule 10b-6 was promulgated pursuant to Section 10(b) of the 1934 Act. SEC Release No. 34-5194 (July 5, 1955). In *Blue Chip Stamps,* this Court upheld the Second Circuit's *Birnbaum* * rule that a private cause of action for damages under Section 10(b) lies only in favor of a plaintiff who has purchased or sold the securities in question. CCI neither purchased nor sold the BPC securities in connection with which the alleged violation of Rule 10b-6 occurred. Consequently, CCI cannot sue BPC for damages under Rule 10b-6.

The court of appeals did not have the guidance of *Blue Chip Stamps.* It purported to distinguish *Birnbaum,* which involved Rule 10b-5, on the ground that "Rule 10b-6 does not contain the clause 'in connection with the purchase or sale of any security', which limits a cause of action under Rule 10b-5." (A-65 n. 29) The distinction is groundless. The "in connection with" language, which is the basis for the decisions in both *Blue Chip Stamps* and *Birnbaum,* comes from Section 10(b) itself, and it does not matter that the SEC chose to repeat the limiting clause in one rule under Section 10(b) but not in the other. Section 10(b) limits the reach of all

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* *Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461 (2d Cir.), *cert. denied,* 343 U.S. 956 (1952).

rules issued under it. As this Court declared in *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375, 1391 (1976):

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is " 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.' " [Citations omitted.] Thus, despite the broad view of the Rule [10b-5] advanced by the [Securities and Exchange] Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b).

See also Miller v. *United States*, 294 U.S. 435 (1935). Were the law otherwise, as the court of appeals here thought, the SEC itself could overrule *Blue Chip Stamps* and the will of Congress by amending Rule 10b-5 to omit the statutory "in connection with" limitation that the rule now contains.

This case is a good illustration of why the decision in *Blue Chip Stamps* was right. Rule 10b-6 prohibits a corporation engaged in a distribution of its securities from simultaneously acquiring either those securities or "rights" to acquire them. The purpose of the rule is "to protect a purchaser of a security in a distribution from abnormal market pressures on the distribution price created by the issuer's or underwriter's own trading." *Weitzen* v. *Kearns*, 271 F. Supp. 616, 623 (S.D.N.Y. 1967); *see also SEC* v. *Scott Taylor & Co.*, 183 F. Supp. 904, 907 (S.D.N.Y. 1959). The securities in "distribution" here were BPC securities. BPC's acquisition of Piper stock was wrongful, if at all, only because it might in theory affect the price of the BPC securities in distri-

bution.* Anyone who purchased these BPC securities is a member of the "especial" class, *Cort* v. *Ash*, 422 U.S. at 78, that was intended to be protected by Rule 10b-6 and can meet the *Blue Chip Stamps* test. CCI was not a purchaser of BPC securities. It did not suffer any injury Rule 10b-6 was intended to prevent.

CCI's injury, if any, has nothing to do with the reason for Rule 10b-6. Its only claim is that it also wanted Piper stock.** CCI would, of course, have suffered exactly the same "injury" if BPC's purchases had been made ten to fifteen days earlier or two months later (either of which would have been possible) when the technical proscriptions of Rule 10b-6 would not have been applicable on any theory. *Birnbaum* and *Blue Chip Stamps* plainly forbid making the purchaser of a security in a technically unlawful transaction liable to a plaintiff whose only claim is that it was seeking the same security.

Obviously recognizing that the court of appeals ruling cannot survive *Blue Chip Stamps*, CCI argued in its opposition to certiorari that Rule 10b-6 might be read to define a "manipulative act" under Section 14(e) of the 1934 Act, which does not contain the words "in connection with the purchase or sale . . . ." This argument is as unpersuasive as it is untimely: BPC's "technical"

* In fact, the district court found that these private, off-exchange acquisitions did not "produce or heighten a stimulating effect on the market." (A-152)

** There was no proof that BPC's purchases affected the price at which any security was purchased or sold by CCI. (A-33) Judge Mansfield (A-111) and Judge Gurfein (A-96) both based CCI's standing solely on the ground that BPC's purchases added to BPC's holdings of Piper stock, rejecting Judge Timbers' speculation (A-65-66) that CCI might show some sort of injury to itself based on a legally presumed (but undemonstrated) market effect of BPC's purchases.

(A-149) violation of Rule 10b-6 did not contravene Section 14(e) either in theory or in fact.

Rule 10b-6 was issued for the carefully limited purpose, stated in the rule itself, of implementing terms "as used in Section 10(b) of the Act." The violations defined by Rule 10b-6 are, in light of its source in Section 10(b), necessarily subject to the statutory purchaser-seller limitation, and CCI's express purpose in asking this Court to reissue the rule under a different section is to change its meaning to remove this inherent limitation.* There is no reason for this Court to engage in such mysterious alchemy. The larger question, whether a rule like 10b-6, which is aimed at market manipulations by sellers, would be appropriate under Section 14(e), which is aimed at fraud by purchasers, is hardly an issue that should receive its initial consideration on certiorari. No lower court ever considered the possibility that BPC's cash purchases of Piper stock violated Section 14(e).

CCI's proposed carelessness with the language and statutory context of Rule 10b-6 is all the more inappropriate since there was no substance behind the technical violation. (A-149) BPC promptly disclosed its purchases of Piper stock. The district court specifically found that CCI was not misled (A-150), that there was "not a scintilla of evidence that any Piper holder was misled" (A-151), and that there was no evidence of any effect on the market for any security. (A-151-52) In the court of appeals, Judges Mansfield (A-111) and Gurfein (A-96) both expressly recognized the absence of any proof of a manipulative effect and predicated standing

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* *Cf. SEC* v. *National Securities, Inc.*, 393 U.S. 453, 465-66 (1969) (rejecting the contention that an SEC rule defining "sale" for purposes of Section 11 of the 1933 Act could be invoked to define the same term as used in Section 10(b)).

on the technical violation. Since there was no manipulation in fact, it is hardly suprising that not even CCI has alleged, until now, that the purchases violated Section 14(e).

B. *CCI Has No Cause of Action for Damages Under Section 14(e) Because It Is Not a Member of the Class Congress Sought To Protect and Did Not Suffer the Injury Congress Sought To Prevent.*

The Williams Act of 1968, which added Section 14(e) to the 1934 Act, is a disclosure statute. As Senator Williams declared in introducing the bill:

> This legislation will close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities. 113 Cong. Rec. 854 (1967). *See also* S. Rep. No. 550, 90th Cong., 1st Sess. 2-3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 3-4 (1968).

To give "stockholders" adequate information to make an investment decision, the Act imposed new filing requirements (Sections 13(d) and 14(d)) plus a traditional prohibition against fraud (Section 14(e)). While it is not clear that Congress intended to create any new damage remedy at all, it is very clear that any such remedy should be limited to the stockholders Congress sought to protect, not extended at their expense to other persons who are seeking their shares.

To begin with, neither the Act nor the committee reports or statements of the sponsors contain any reference

to any new private federal damage remedy.* If there is any such remedy at all, there is no reason to think it extends to suits against persons who have made registered exchange offers, such as that made by BPC. The gap that Congress perceived in the regulatory pattern was that *cash* tender offerors had no affirmative disclosure obligations to the shareholders whose stock they were seeking. *E.g.*, S. Rep. No. 550, 90th Cong., 1st Sess. 1-3 (1967). As to registered exchange offers, adequate damage remedies were already available in appropriate cases under Sections 11 and 12(2) of the 1933 Act.**

If a federal court is nevertheless going to imply a new cause of action for damages under Section 14(e) against the maker of a registered exchange offer, it must at least find implicit congressional intent to provide redress for the kind of harm the plaintiff is alleging. Such a finding is required by both the general law of torts and the inherent limitations imposed by the federal system, and this Court has repeatedly insisted on it for both reasons.

The doctrine that the federal courts can imply damage actions from federal statutes originated during the reign of *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). It was based on the common law tort principle that the violation of a statute makes the actor liable to another person if

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* Nor is there any reference to *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), or any other case recognizing an implied damage action under the federal securities laws.

** CCI cannot qualify as a plaintiff or prove a cause of action under Section 11 or Section 12(2), although it has been awarded damages in excess of the amounts available under those sections. If Congress enacted Section 14(e) in order to circumvent the express limitations of those sections, it gave no indication of its intentions. *Cf. Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975).

the intent of the statute was to protect that person from the particular harm caused. *See Restatement of Torts* § 286 (1934).* Accordingly, in *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, 39 (1916), the Court ruled that a railroad switchman could recover from his employer for injuries resulting from a violation of federal railroad safety legislation because the employee was "one of the class for whose especial benefit the statute was enacted." This doctrine was first applied to the federal securities laws in the two-page opinion in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). The district court in *Kardon*, relying on *Rigsby*, the *Restatement of Torts*, and "fundamental" law, *id.* at 514, ruled that shareholders who were induced to sell their stock by "fraudulent misrepresentations" could recover under Section 10(b) and Rule 10b-5 because they were members of the class for whose special benefit the section was enacted and had suffered the type of injury it was intended to prevent.

Since *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), which was not referred to in *Kardon*, this Court has consistently recognized that limiting implied federal damage remedies to the persons Congress sought to protect and the type of injury Congress sought to prevent is required not only by general tort law but also by fundamental restrictions on the power of the federal courts. In *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942), the Court ruled that a damage remedy, though implied rather than explicit, must be "derived from the

* The most recent formulation is that "in furtherance of the purpose of particular legislation" a court may "supply a civil action for damages affording relief to a person *for whose benefit* conduct of another was either proscribed or required by the legislation." *Restatement (Second) of Torts* § 874A (Tent. Draft No. 22, April 1976) (emphasis added).

statute and the federal policy which it has adopted." Quoting this language, the Court in *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), allowed stockholders a direct and derivative damage remedy for "[t]he injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation," *id.* at 432, the very injury the proxy requirements were designed to prevent. In *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), a unanimous court stated the doctrine of *Rigsby* and *Borak* as follows:

> Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, *and* because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper. *Id.* at 202 (emphasis added).

Both parts of this formula have recently been reemphasized by the Court. Little more than a year ago, in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), Mr. Justice Brennan, speaking for a unanimous Court, re-endorsed the strict *Rigsby* test of whether implication of a private damage remedy in favor of a particular plaintiff is appropriate:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff?

In *Cort*, the plaintiff was denied standing as not sufficiently "especial" even though he was within the class of secondary beneficiaries explicitly named in the history of the legislation. *Id.* at 80-81. In *Rondeau* v. *Mosinee*

Paper Corp., 422 U.S. 49 (1975), decided the same day as *Cort*, the Court noted that mere membership in the special class is not enough to obtain a remedy: the plaintiff bringing an implied action under a federal statute must also allege a type of harm "redressable under its provisions." *Id.* at 60.

In short, the right to recover damages in a federal court is not merely a matter of providing redress for an injury perceived (or, in this case, presumed) by the court. The statute itself must "create a federal right in favor of the plaintiff." *Cort*, 422 U.S. at 78. If the statute is not explicit, this right may only be implied from a clear congressional intention to provide an "especial benefit" to a particular class of persons by protecting them against particular harm.*

That plain and sound doctrine precludes recovery by CCI here. The legislative history of the Williams Act makes it clear that the shareholders of the target corporation, not tender offerors or others who might indirectly be affected by the shareholders' misimpressions, were alone the intended beneficiaries of the statute. Senator Williams spoke directly to the point in introducing the bill:

> The purpose of this bill is to require full and fair disclosure *for the benefit of stockholders* while at the same time providing the offeror and management equal opportunity to fairly

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* *See Mason* v. *Belieu*, No. 74-1731 (D.C. Cir., April 15, 1976) (although plaintiff's injury was "directly and foreseeably caused" by violation of Federal Aviation Act, she had no cause of action on ground that "someone *else* was denied transportation"); *Polansky* v. *Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975) (plaintiff was within the protected class, but did not allege a redressable harm, and was held not to have an implied cause of action).

present their case. 113 Cong. Rec. 854-55 (1967) (emphasis added).

The committee reports on the Williams Act are equally plain about the kind of harm the statute was intended to redress—harm to shareholders who need adequate information to make the decision whether to tender or hold:

> The public shareholder must, . . . with severely limited information, decide what course of action he should take. He has many alternatives.
>
> . . . .
>
> Without knowledge of who the bidder is and what he plans to do, the shareholder cannot reach an informed decision. He is forced to take a chance. For no matter what he does, he does it without adequate information to enable him to decide rationally what is the best possible course of action. This is precisely the kind of dilemma which our Federal securities laws are designed to prevent. S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967). *See also* H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2-3 (1968).

The explanations of Section 14(e) in particular emphasized that Congress regarded tender offerors simply as persons upon whom obligations were imposed for the benefit of the shareholders:

> This provision would affirm the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal. S. Rep. No. 550, 90th Cong.,

1st Sess. 11 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968).

During the House hearings, the Chairman of the SEC testified:

> I would like to emphasize and reemphasize that the purpose of the bill . . . is a very simple one, solely to provide information to investors so that they can arrive at an informed investment decision. It is not designed to assist the offeror, nor designed to assist the management in resisting any plans put forward by the offeror. It is essentially based on the concept that the investor should have the information so that he can arrive at a decision. *Hearings on H.R.14475, S.510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 17 (1968).

He told the Senate Committee:

> The investor is lost somewhere in the shuffle. This is our concern and our only concern. *Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 178 (1967).

An important financial witness testified specifically that tender offerors required no protection:

> The two major protagonists—the bidder and the defending management—do not need any additional protection, in our opinion. They have the resources and the arsenal of moves and countermoves which can adequately protect their

> interests. Rather, the investor—who is the subject of these entreaties of both major protagonists—is the one who needs a more effective champion, and this is an important point. *Hearings on S. 510 Before Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. 57 (1967) (testimony of Professor Hayes).

In view of this history, it is hardly surprising that the courts have uniformly recognized protection of the target company's shareholders as the purpose of the Williams Act. In *Rondeau* v. *Mosinee Paper Corp.*, this Court declared:

> The purpose of the Williams Act is to insure that *public shareholders who are confronted by a cash tender offer for their stock* will not be required to respond without adequate information regarding the qualifications and intentions of the offering party. 422 U.S. at 58 (emphasis added).*

In *Klaus* v. *Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1976), the Ninth Circuit denied a remedy to a deliberately defrauded tender offeror with the words "*the Williams Act was designed to protect cash tender offerees, not offerors.*" *Id.* at 232 (emphasis added). In *Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 769 (5th Cir. 1974), the court declared:

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* In rejecting the target company's claimed right to obtain an injunction to protect the interests of those of its shareholders who either sold at predisclosure prices or would not have invested had they known of the imminent takeover bid, the Court further declared: "[T]he principal object of the Williams Act is *to solve the dilemma of shareholders desiring to respond to a cash tender offer,* and it is not at all clear that the type of 'harm' identified by respondent is redressable under its provisions." 422 U.S. at 60 (emphasis added).

> The focus of the legislative history of section 14(e) is on adequate disclosure to those investors whose tenders are being solicited so that an informed meaningful consideration of the alternatives can be made.
>
> . . . .
>
> The evil to be remedied was inadequate disclosure to tendering security holders. Congress made it clear that the investor protection sought by 14(e) was disclosure to those who had to make the hold or sell decision.

Even Judge Timbers in *Chris-Craft II* acknowledged that "'[t]he legislative history of the 1968 amendment demonstrates that the focus of legislative interest was on the public shareholder; Congress wanted to ensure that he had the benefit of a full statement from the offeror, with a chance for "incumbent management" to "explain its position publicly," if so disposed . . . .'" (A-30-31, quoting *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 945 (2d Cir. 1969)) *Accord, Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 598 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 423-24 (1st Cir. 1973).

CCI falls well outside the class for whose "especial" benefit Section 14(e) was enacted and has not alleged harm that Section 14(e) was intended to redress. Congress' stated concern was for persons in the position of the Piper shareholders who had to decide, based on BPC's prospectus, whether to tender their shares to BPC; the harm Congress intended to prevent, in a situation like the present one, was injury to those who did so. CCI is obviously not a member of that class. To be sure, by

regulating solicitations "in opposition to" as well as in favor of tender offers, Congress extended protection also to target shareholders who *fail* to tender because of a misleading opposition solicitation.* This is the class excluded by *Birnbaum* and *Blue Chip Stamps* from suing under Section 10(b). But CCI is not a shareholder misled into not tendering and so is not a member of this class either. In any event, BPC made no solicitation "in opposition to" any tender offer. Finally, even if the congressional intent to protect target shareholders were read so broadly as to permit nontendering shareholders, without proving that they made any investment decision at all, to recover from a tender offeror who has injured their company and hence their investments (*see Smallwood* v. *Pearl Brewing Co., supra*), CCI has no cause of action. No such injury to Piper is involved in this case.

CCI was awarded a massive judgment not because it was misled into tendering shares, nor because it was misled into not tendering shares, nor because there was any injury to Piper that affected the value of CCI's Piper investment. CCI sought and was given damages solely as a competitor for the same shares BPC obtained in its exchange offer. CCI is not in the special class, and it does not allege the particular harm with which Congress was concerned in the Williams Act.

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* Section 14(e)'s prohibition of material omissions in "any solicitation of security holders in opposition to" a tender offer was intended to protect the target corporation's shareholders. *See* S. Rep. No. 550, 90th Cong., 1st Sess. 11 (1967). The concern of Congress was not to protect tender offerors but, "[i]n the rather common situation where existing management or third parties contest a tender offer," to protect the "shareholders [who] may be exposed to a bewildering variety of conflicting appeals and arguments designed to persuade them either to accept or to reject the tender offer." 113 Cong. Rec. 855-56 (1967) (remarks of Senator Williams).

The court of appeals' extension of standing beyond the statute's "target area" is especially unwarranted in light of its effect on the persons Congress was trying to protect. They, the Piper shareholders who exchanged their shares for BPC securities, were offered rescission; all declined. But if CCI's suit, based on what amounts to an allegation of tortious interference with its competing quest for their shares, is allowed to succeed, the tendering Piper shareholders (who now hold BPC securities) would be among the primary victims of CCI's recovery. *Cf. H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 424-25 (1st Cir. 1973).*

The so-called "standing" cases that involve only injunctive relief are not pertinent here, except insofar as they demonstrate that a plaintiff may have standing to seek an injunction even though he himself has not suffered harm redressable in damages. That point was made in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972),

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* The court of appeals misinterpreted (at A-32) Judge Friendly's general observation, in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969), that:

> In effect [Section 14(e)] applies Rule 10b-5 both to the offeror and to the opposition—very likely, *except perhaps for any bearing it may have on the issue of standing,* only a codification of existing law. *Id.* at 940-41 (emphasis added).

Under the *Birnbaum* rule a target shareholder who refrained from tendering his shares because of a misleading opposition statement could not sue under Section 10(b) because he was neither a purchaser nor a seller. The speculation that Section 14(e) might remove that obstacle offers no support for an extension of standing beyond the shareholders who were the intended beneficiaries. The holding of *Electronic Specialty* was simply that the target company had standing to seek injunctive relief. *See also Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842 (2d Cir. 1970) (Friendly, J.). The case has no bearing on whether a person other than a shareholder has a right to obtain damages for injury to itself.

involving Sections 4 and 16 of the Clayton Act, which authorize private damage and injunction suits, respectively, for violation of the antitrust laws. This Court held in *Hawaii* that while a State may, along with many other plaintiffs, sue for injunctive relief against violations of the antitrust laws, it may not sue for damages to its general economy because that kind of injury is not compensable under Section 4 of the Clayton Act. *Id.* at 264. In reaching that conclusion, the court naturally recognized that every violation "is a blow to the free-enterprise system," *id.* at 262, that every damage award might be defended as serving some deterrent purpose, and that the harm alleged by Hawaii could be assumed to be real. Nevertheless, it said, if that "type of injury is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so . . . ." *Id.* at 264. Standing to seek an injunction may be broadly afforded, said the Court, because "the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." *Id.* at 261. Separate but cumulative claims for damages are different, for they multiply the defendant's liability and may be duplicative. *Id.* at 261-62. Thus damages suits present, in a way that injunction actions do not, the question of how far Congress intended liability to extend.*

* The distinction between an injunction to enforce the policy of the law and damages to remedy a harm not contemplated by Congress is equally clear in the securities laws. *See, e.g., SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193 (1963); *Kahan* v. *Rosenstiel*, 424 F.2d 161, 173 (3d Cir.), *cert. denied sub nom. Glen Alden Corp.* v. *Kahan*, 398 U.S. 950 (1970); *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540, 547 (2d Cir. 1967); *Neuman* v. *Electronic Specialty Co.*, [1969-1970 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,591 at 98,703-04 (N.D. Ill. 1969); *cf. General Time Corp.* v. *Talley Industries, Inc.*, 403 F.2d 159, 164 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969).

Only two other arguments were suggested in the opinions below to support the implication of a cause of action on behalf of CCI, and both have already been rejected by this Court. Judge Mansfield said that CCI had "standing solely on the ground that vigorous enforcement of the anti-fraud provisions . . . calls for . . . implication of a private right of action in favor of a defeated contestant. . . ." (A-102-03) But standing "solely" on this ground was rejected in *Blue Chip Stamps*, 421 U.S. at 748-49. The unlimited invocation of the "vigorous enforcement" rationale would result, as here, in crushing judgments " 'payable in the last analysis by innocent investors.' " *Id.* at 739, quoting *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring). The target shareholders, the protected class, can provide a supplement to SEC enforcement actions and to the express causes of action Congress did create, if a supplement is deemed "necessary." *Rondeau*, 422 U.S. at 62.

Judge Timbers also argued that CCI "probably could state a claim for relief in most state courts against each of the defendants for tortious interference," and that he would "not infer from the silence of the statute that Congress intended to deny a federal remedy and to extinguish a liability which, under established principles of tort law, normally attends the doing of a proscribed act." (A-30) In *Cort*, this Court reached exactly the opposite conclusion: the existence of a traditional state-court remedy based on state law argues against, not for, implying a federal remedy from a federal statute designed to protect a different class of persons. 422 U.S. at 84-85; *cf. Blue Chip Stamps*, 421 U.S. at 738-39 n.9.*

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* As noted by the American Law Institute, "There is a problem of broadening the jurisdiction of the federal courts if the court-

At bottom, the argument for CCI's right of action for damages is that if a nondisclosure to Piper shareholders did CCI an injury, even a conclusively presumed rather than a proved one, it must have a federal remedy. This is the more or less explicit rationale of the court of appeals. (A-30, 95) But as the Second Circuit recognized in *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963 (1969), *cert. denied*, 399 U.S. 909 (1970), in denying a damage remedy under Section 10(b) to a deliberately defrauded tender offeror, the fact that a plaintiff may have been hurt by the defendant's conduct "does not mean that a federal remedy must be furnished by judges. . . . If there is to be a federal remedy, it is the Congress which must create it." *Id.* at 969. The Second Circuit's later conclusion that Congress created such a remedy for CCI when it enacted Section 14(e) finds no support in the language, history, or purpose of the Williams Act.

II. The Actions of BPC and Its Directors Did Not Involve "Intent to Deceive, Manipulate, or Defraud" and Therefore Cannot Give Rise to Damage Liability Under Rule 10b-6 or Section 14(e).

In *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375 (1976), this Court held that no private cause of action for damages will lie under Section 10(b) and Rule 10b-5 absent proof of "scienter"—defined as "a mental state embracing intent to deceive, manipulate, or defraud." *

granted remedy of a civil action for damages is treated as arising out of a federal statute. For this reason the federal courts may give particular attention to the question as to whether the state remedies are adequate." *Restatement (Second) of Torts* § 874(A), comment h at 79-80 (Tent. Draft No. 22, April 1976).

* The Court found it unnecessary to decide whether "recklessness" that is "a form of intentional conduct" could ever be sufficient to permit imposition of civil liability under Section 10(b). 96 S. Ct.

Id. at 1381 n. 12. Starting with the words of the statute itself, the Court noted that the terms " 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that § 10(b) was intended to proscribe knowing or intentional misconduct." *Id.* at 1383. The Court reviewed the legislative history of the 1934 Act and concluded that "[t]here is no indication that Congress intended anyone to be made liable for . . . [manipulative and deceptive] practices unless he acted other than in good faith." *Id.* at 1387. The Court's careful analysis of the express civil liability provisions of the federal securities laws, *id.* at 1387-89, confirmed that Section 10(b) creates liability only for intentional misconduct, and its examination of the history of Rule 10b-5 confirmed that the SEC had only "fraud" in mind when it adopted the language of the rule. *Id.* at 1390 n. 32.

BPC's actions did not involve "intent to deceive, manipulate, or defraud." To the contrary, the court of appeals approved the findings of the district court that BPC's two technical violations were committed in good faith without fraudulent intent. (A-37, 47, 97-98, 117-23, 142-44, 150; D-14; *cf.* C-28-31) Under these circum-

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at 1381 n. 12. The Court did not attempt to define "recklessness" but plainly regarded it as conduct demonstrating a high level of culpability, since the plaintiff's charge in *Hochfelder* that the defendants acted with "inexcusable negligence" was insufficient to meet the test. *Id.* at 1380 n. 5. We submit that the rationale of *Hochfelder* precludes basing liability on recklessness, except in the limited evidentiary sense that sufficiently outrageous conduct can support a finding of "intent to deceive, manipulate, or defraud" despite a defendant's protests of good faith. But that issue need not be resolved here. The complaint did not charge BPC with recklessness in the Rule 10b-6 or Section 14(e) violations (F-1); CCI has always proceeded on a theory of intentional misconduct, *cf. Hochfelder*, 96 S. Ct. at 1391; and there was no finding (and no basis for a finding) of recklessness.

stances, the principles of *Hochfelder* preclude imposing liability on BPC. For while neither Rule 10b-6 nor Section 14(e) was involved in *Hochfelder*, there is no justification for applying a different standard of culpability in actions based on those provisions than in actions based on Rule 10b-5.

A. *The Actions of BPC and Its Directors Did Not Involve "Intent to Deceive, Manipulate, or Defraud."*

1. The Rule 10b-6 Violation.

Between May 14 and May 23, 1969, after announcing its intention to make an exchange offer for Piper shares but two months before beginning the exchange offer, BPC bought 120,200 Piper shares for cash in off-exchange transactions from three large investors. BPC's "intent" in making these purchases was simply to increase its holdings of Piper shares as part of its announced effort to gain control of Piper.

Far from intending to deceive anyone, BPC publicly disclosed these cash purchases immediately in its Schedule 13D filed with the SEC, again on May 29 in the preliminary prospectus for its exchange offer, and again in the final prospectus. Reports of the purchases appeared in the press. (App. 374A; EV 31, 1092) The district court found that CCI "was not misled" by these purchases (A-150) and that there was "not a scintilla of evidence that any Piper holder was misled." (A-151) Far from having "a mental state embracing intent to . . . defraud," 96 S. Ct. at 1381 n. 12, BPC was an "innocent party" that "did not then know of any rule or interpretation precluding the transactions" (C-22, 30, Lumbard C. J., dissenting) and was advised by its lawyers that the purchase

were lawful.* BPC had acted in a way that was "well within the spirit" of one of Rule 10b-6's several exemptions. (A-151) And far from intending to manipulate the price of any security, BPC's purchases "were not designed to produce a stimulating effect" (A-66), and did not "produce or heighten a stimulating effect on the market." (A-152)

In fact, BPC could not logically have intended the evil against which Rule 10b-6 is aimed. The rule prohibits a corporation that is engaged in distributing its securities from simultaneously purchasing the same securities or "rights" to the securities; its plain purpose is to prevent artificial stimulation of the market price of the securities being distributed. *Weitzen* v. *Kearns*, 271 F. Supp. 616, 623 (S.D.N.Y. 1967); *SEC* v. *Scott Taylor & Co.*, 183 F. Supp. 904, 907 (S.D.N.Y. 1959). CCI contended here that the Piper stock bought by BPC technically constituted "rights" to acquire BPC securities. The district court rejected this contention, pointing out that BPC's purchases would, if they had any market effect, "obviously serve only to make Bangor Punta's exchange offer appear less desirable to Piper shareholders" by raising the price of Piper stock. (C-45)

The court of appeals in *Chris-Craft I* reversed on the ground that the transactions in question fell within the

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* It was the opinion of both BPC's in-house counsel and its outside counsel that Rule 10b-6 did not apply to purchases of Piper stock by BPC. Counsel advised that, taking "a conservative position," it would be "proper to buy shares of [Piper] but only if they were unsolicited and not over an exchange." (App. 1645A)

CCI had itself earlier purchased Piper shares on the open market following the announcement of its exchange offer, relying on an opinion of highly qualified counsel that Rule 10b-6 did not prohibit cash purchases of target company stock by an exchange offeror. (A-13; App. 401A)

literal terms of the rule and that cash purchases of a target company's stock might theoretically stimulate interest in the exchange offer.* (C-17-18) But the court of appeals had before it no evidence (and did not purport to make any finding) of any actual manipulative intention or effect of the purchases, and the district court on remand found no such intention or effect. (A-151-152) In short, as the district court found, there was no "substance in the 10b-6 contention behind the technical violation . . . ." (A-149)

In *Chris-Craft II*, each of the judges recognized that there was no proof that BPC's challenged cash purchases had a manipulative intent or effect. (A-63-67; A-96; A-111) Judge Timbers wanted to predicate liability on the extraordinary argument that since the court had previously held that the purchases were within Rule 10b-6, "then presumptively a stimulating effect was produced which misled the public." (A-66) Judge Mansfield, however, responded crisply that "[t]here was no such proof." (A-111) He and Judge Gurfein (A-96) explicitly predicated damages on the bare fact of the technical violation. They held, in short, that scienter in the *Hochfelder* sense was unnecessary in a private action under Rule 10b-6. This Court's subsequent decision shows that they were wrong.

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* Even so, no one has ever explained why, as long as the purchases were correctly disclosed (as they were here), this is a "manipulation." Purchases by a corporation of the very securities it purports to be distributing (or the rights, like warrants, to buy those securities), will have an *artificial* upward impact on the market price of the securities being sold. This is the manipulation at which Rule 10b-6 is aimed. But purchases of a target company's stock (which are "rights" only because of the exchange offer itself) are entirely consistent with the offeror's announced and legitimate intentions.

What happened here is that a new and disputed interpretation of Rule 10b-6 was applied to BPC's purchases without the slightest proof that they had either a manipulative purpose or a manipulative effect. The court of appeals thus impermissibly substituted retroactive application * of a rule of manipulation for a finding that BPC's technical violation of Rule 10b-6 involved an "intent to deceive, manipulate, or defraud." **

2. **The Section 14(e) Violation.**

The district court found that BPC's exchange offer prospectus was "unintentionally in error" (A-143) in failing to disclose that the carrying (or book) value of BPC's interest in the Bangor and Aroostook Railroad ("BAR") was higher than the current market value

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* On May 5, 1969, the SEC issued Release No. 34-8595 asking for public comment on *proposed* Rule 10b-13 prohibiting tender offerors from purchasing target company stock otherwise than pursuant to the tender offer. This rule did not become effective until November 10, 1969 and is not involved in this case. Although the SEC proclaimed in the release that this was merely "a codification of existing interpretations under Rule 10b-6," this assertion was rejected by all courts in this case. Indeed, the court of appeals itself noted that "neither the SEC nor the parties to this action have cited any such precedents, nor have we found any." (C-16; see also the district court's opinion at C-45).

** Nor is there any evidence or finding that BPC acted recklessly in making the cash purchases held to violate Rule 10b-6. CCI likes to pretend that the SEC warned both aspirants against making cash purchases and that CCI obeyed while BPC did not. In fact, for reasons never satisfactorily explained, the SEC staff personally advised CCI's chairman not to make the particular purchases at issue while "no such warning was ever communicated to Bangor Punta." (C-30 n. 4; *cf.* A-13, 15-16) Once again, no court has ever disputed Chief Judge Lumbard's characterization of BPC as an "innocent party" (C-30, n. 4) which "did not then know of any rule or interpretation precluding the transactions . . . ." (C-22) The SEC never charged BPC with a violation of Rule 10b-6 and never required it to disclose the supposed violation in any registration statement or other filing.

of that investment. The district court found that BPC had no "intent to mislead" (A-143) in making this mistake. Unfortunately for BPC, the SEC and CCI had originally accused it of a much more serious violation: deliberately deferring concluding an agreement to sell the BAR for less than its carrying value in order to avoid disclosing the loss in the exchange offer prospectus. (D-11-12) The district court found that accusation "unequivocally negate[d]" (D-11) by the credible evidence. Nonetheless, the accusation has continued to underlie the scienter arguments made by CCI. For that reason, it is necessary to make clear exactly what the violation actually found by the district court was.

On January 1, 1969, BPC owned a 98.7% stock interest in the BAR, which it had been considering disposing of for some time. The BAR investment was carried on BPC's books at $18.4 million on the basis of a 1965 appraisal.* Although the use of that figure as of that date was not challenged, the fact that it resulted from an appraisal rather than from a transaction is critical to what followed.

On April 1, 1969, BPC's Board appointed a committee to study a management plan to divest the BAR in whole or in part to BPC's shareholders, as well as other possibilities. (D-5; App. 1650A-51A) Several weeks later a member of the committee received an offer from Amoskeag Corporation to purchase the BAR stock for $5 million. (D-5) The committee reported to the Board on May 21, 1969. The proposal to sell the BAR stock "was

* The circumstances leading to the use of this figure (rather than BPC's shareholder's equity in the BAR of $29.8 million) were fully described in the financial statements contained in the exchange offer prospectus (EV 93, 99) and are set forth in the district court's opinion at D-3-4.

a surprise to the Board and met with the objection that the Board had insufficient information to make an intelligent decision since a great deal of accounting, tax and legal work had to be done to put the offer in proper focus." (D-7) The Board authorized further negotiations, seeking a higher price, subject to an investigation of tax and accounting consequences.* (A-44; D-5-8)

No understanding was reached with Amoskeag, however, and on June 3, 1969, BPC "table[d] the entire matter until the tax impact upon Bangor Punta of a sale of assets, as compared with some other disposition of the interest, could be studied and ascertained." (D-8, footnote omitted) The Board did not take the matter up again until September 9, 1969, when it authorized a sale of the BAR assets to Amoskeag, if possible, but if not, of the BAR stock. (A-44) Amoskeag only wanted the stock, and a sale of BPC's BAR stock to Amoskeag for $5 million in cash and contingent consideration was agreed to October 2, 1969, more than two months after BPC's exchange offer closed. The sale was announced the next day and the market price of BPC's stock reacted favorably. (D-9-13; App. 591).

On May 29, 1969, shortly after the May 21 Board meeting, BPC had filed a registration statement covering its exchange offer for Piper shares. The registration statement became effective on July 18, and the exchange offer continued until July 29. The prospectus carried the BAR investment at $18.4 million and did not mention the offer from Amoskeag. BPC, its directors, its in-house

* The district court, which heard the witnesses testify, found that BPC's representative "explicitly informed [Amoskeag] that time was needed for accountants and tax personnel of Bangor Punta to *review the tax effects of any deal and the evidence unquestionably confirms* [BPC's representative's] *limited exploratory role.*" (D-8, n.5) (emphasis in original)

counsel and its outside counsel were fully aware that an offer for the BAR had been received. First Boston and its counsel had read the minutes of the relevant Board meetings and had discussed the BAR matter with BPC counsel and executives. (A-48; App. 1657A-59A) Since there had been no decision to sell—indeed, the matter had been tabled—and since the financial effect of any disposition of the BAR would depend on the form of the transaction (which was still being studied),* no one suggested that disclosure of possible disposition was required. BPC's independent accountants were also fully aware of the negotiations concerning the BAR when they permitted the use of their opinion in the exchange offer prospectus. (D-6-13; App. 1759A-61A; EV 87, 89)

These facts wholly undermined the accusation that BPC decided "at some undefined time during June, July or August" (D-11) to sell the BAR to Amoskeag but had deferred the formalities to avoid writing down the investment during the exchange offer. The district court held that "the evidence which the Court accepts as worthy of belief unequivocally negates any such purpose or plan," (D-11) and that "[t]he Court has found that as of these dates [ending with August 27, 1969, the final date on which SEC rules required delivery of the prospectus] Bangor Punta had not reached a decision to sell." (D-13)

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* For example, a sale of the assets might have resulted in the recognition of a large tax loss, which would have produced the benefit of additional cash flow for BPC. At one time it was thought that the cash flow might be as high as $17.5 million but after the extensive investigation required (which ended in September 1969) the cash flow advantage was estimated at about $9 million. (D-8-12; App. 2163A-66A) Sale of the stock might, it was recognized, result in capital gains tax; and this is what eventually did happen.

The district court did fault BPC, however, on a different theory: leaving the $18.4 million appraisal figure on its balance sheet without additional explanations. The court concluded that the $18.4 million figure was "obsolete" (D-14) in that it did not represent "the market value of the BAR holding." (D-13) BPC has, of course, never contended that in 1969 its directors believed the market value of the BAR to be $18.4 million. Their "unintentional" error was in applying to this special situation the normal rule that a balance sheet carrying value is only adjusted when there is a transaction or other definitive event establishing a new figure.*

The district court specifically found that BPC had no "propensity or natural inclination to violate the securities law" (D-17), that there was "no evidence of . . . bad faith" (D-16), no "intent to mislead" (A-134), and no "form of scienter." (A-144) Calling the BAR item a "mere negligent omission" (A-148), the district court went on to state its conclusions in full as follows:

> I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its di-

* Judge Mansfield, concurring, pointed out that

> . . . under generally accepted accounting principles "stated book value" may properly be used in a financial statement and is not viewed in the financial world as the equivalent of market value. A person able to read a balance sheet would probably have recognized that such "historical" cost did not necessarily represent current liquidating value. Furthermore, to write down the figure immediately to $5 million might have been treated by the SEC as speculative and possibly misleading, in view of the other forms of disposition of BAR that were still under consideration. (A-122-123)

> rectors intend to gain an advantage over Chris-Craft by the nondisclosure in the contest being waged for control of Piper. There was no purposeful connection between the nondisclosure and the contest for control. In other words, the nondisclosure was not prompted by an improper purpose. However, absence of bad faith does not excuse the failure to state facts necessary to make the facts stated not misleading. (D-14)

The court of appeals accepted these findings. Judge Timbers in the main opinion said: "Our disagreement with the district court on whether defendants have violated § 14(e) does not go to its findings of fact, as to which the 'unless clearly erroneous' test applies, but to its application of the legal standards [of scienter] just discussed." (A-37) And later in his opinion he declared:

> The district court's findings of fact, supported by substantial evidence, do not warrant the conclusions that BPC's officers had decided to sell the BAR before the exchange offer became effective and had postponed consummation in order to avoid disclosure. *Nor does the evidence show that BPC failed to disclose the sales negotiations in bad faith.* As we have indicated above, however, *intent to defraud is not an indispensable element in a private action for damages under the antifraud provisions of the federal securities laws.* (A-47, emphasis added)

Judge Gurfein concurred. (A-97-98) Judge Mansfield concurred at some length, emphasizing that the findings of fact as to BPC's actions were "fully supported by more than ample credible evidence" (A-117), including findings as to "absence of bad faith or of an intent or purpose to violate the securities laws." (A-122)

The court of appeals reversed the district court and awarded damages to CCI, because, as Judge Timbers stated, it applied a different "legal standard" (A-37) of scienter:

> In sum, and put as simply as possible, the standard for determining liability under § 14(e) on the part of a person making a misleading tender offer, or a responsible officer of a corporation making such an offer, is whether plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort. (A-36-37)

Judge Mansfield concurred, using almost exactly the same words. (A-106)

This standard requires only that the defendant have actual or imputed knowledge of the existence of any undisclosed fact later deemed by a court to have been material. As Judge Friendly pointed out in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301 n.20 (2d Cir. 1973), it is a doctrine of "virtually absolute liability" where the defendant is a corporation because the corporation is "charged with the knowledge of all its agents." *

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* In *White* v. *Abrams*, 495 F.2d 724, 732 (9th Cir. 1974), the court noted the inherent inconsistency in pronouncements on the scienter requirement in *Chris-Craft II*: "We have difficulty with the court's announced position that mere negligence is not sufficient for liability while in the same case it summarizes with language that sets forth a negligence standard . . . ." The Second Circuit later described the *Chris-Craft II* scienter test as permitting the imposition of liability upon a showing of "something short of specific intent to deceive," *Republic Technology Fund, Inc.* v. *Lionel Corp.*, 483 F.2d 540, 551 (2d Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

BPC was of course aware of the offer for the BAR. But that is not enough to satisfy the standard articulated in *Hochfelder*. There was, as the courts below repeatedly acknowledged, no intent to deceive, manipulate, or defraud.*

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* Nor was there any finding (or the basis for any finding) of recklessness. Recklessness generally means acting with disregard of a known, actual risk of doing substantial injury to another person. *See Restatement (Second) of Torts*, § 500 (1965). Here, BPC had no reason to believe that nondisclosure of the BAR negotiations might injure Piper shareholders. BPC represented that it was offering securities "valued in the judgment of The First Boston Corporation at not less than $80 per Piper share," and the securities it offered *were* valued at that price by First Boston (A-140), which was fully aware of the preliminary negotiations for the sale of the BAR and whose opinion was unaffected thereby. No court has suggested that First Boston's opinion as to value was wrong; to the contrary, the district court found that "actual values reached by the Bangor Punta package were so close to $80 as to render any variance *de minimis*." (A-140) When the BAR sale did take place more than two months after the registration statement became effective, the price of BPC securities went up, not down. (App. 591A)

Judge Timbers once called the BAR omission a "flagrant" violation (A-84) and at another point used the term "reckless," (A-48) but his adjectives were rejected by Judge Mansfield. (A-122) And Judge Gurfein—writing for the court on the injunction issue—stated that even though "reckless conduct" is a proper basis for an SEC injunction, the district court's findings supported the denial of an injunction. (A-98-99) Finally, in his dissent from the denial of the general injunction the SEC had sought, Judge Timbers acknowledged again the district court's findings "that BPC did not *intentionally* or *purposefully* mislead and did not act in *bad faith*" (A-84, emphasis in original), while arguing that denial of the injunction "was clearly erroneous" (*id.*) under the proper legal standard.

B. *If There Is Any Cause of Action for Damages Under Rule 10b-6 or Section 14(e), It Does Not Lie in the Absence of Proof of "Intent to Deceive, Manipulate, or Defraud."*

There is no justification for permitting imposition of damage liability under Rule 10b-6 or Section 14(e) on a lower standard of culpability than that governing actions under Rule 10b-5.

1. Rule 10b-6.

This Court's holding in *Hochfelder* that Section 10(b) permits imposition of damage liability only upon proof of intent to deceive, manipulate, or defraud governs actions brought under Rule 10b-6 as well as those brought under Rule 10b-5. The decisive point, with respect to both rules, is that the SEC simply "cannot exceed the power granted [it] by Congress under § 10(b)." *Hochfelder*, 96 S. Ct. at 1391; *see Miller* v. *United States*, 294 U.S. 435, 439-40 (1935).

Requiring proof of deceptive or fraudulent intent as a prerequisite to recovery of damages under an anti-manipulation provision like Rule 10b-6 is also the right result, for, as this Court declared in construing Section 10(b) in *Hochfelder*:

> Use of the word "manipulative" is especially significant. It is and was virtually a term of art when used in connection with securities markets. *It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.* 96 S. Ct. at 1384 (emphasis added; footnote omitted).

And, as the Court also noted in *Hochfelder*, since the provisions of the 1934 Act that deal more specifically

with artificial market-affecting practices require scienter, the sensible conclusion is "that Congress intended no lesser standard under § 10(b)." *Id.* at 1386.

Accordingly, there can be no recovery by a private plaintiff in an action based on Rule 10b-6 without proof of scienter.

2. Section 14(e).

The operative language of Section 14(e) is simply a restatement of paragraphs (2) and (3) of Rule 10b-5. Some of that language, when "[v]iewed in isolation . . . could be read as proscribing . . . any type of material misstatement or omission . . . whether the wrongdoing was intentional or not," *Hochfelder*, 96 S. Ct. at 1390. But no fair reading of Section 14(e) in its statutory context can support an inference of congressional intent to establish a standard of damage liability different from that applicable under Rule 10b-5.

This was the conclusion of the court of appeals, which created the Section 14(e) damage action. On the question of scienter, Judge Timbers declared that the court would "follow the principles developed under Rule 10b-5 regarding the elements of such [Section 14(e)] violations." (A-34) Similarly, Judge Mansfield recognized that "[n]o reason has been advanced for a different standard [of scienter] in the enforcement of § 14(e), the language of which is substantially the same as that found in § 10(b) and Rule 10b-5." (A-103) This basic ruling was correct; the court of appeals' error, as shown above, was using the wrong scienter test under Rule 10b-5.

Each of the other courts that has considered the question has also assumed or held that the same standards —including the scienter requirement—applicable under

Rule 10b-5 govern Section 14(e). For example, Judge Wisdom, writing for a unanimous court in *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 605 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974), declared: "Congress adopted in Section 14(e) the substantive language of the second paragraph of Rule 10b-5 and in so doing accepted the precedential baggage those words have carried over the years . . . . Once standing is established, therefore, the analysis under Section 14(e) and Rule 10b-5 is identical." On the specific problem of scienter he again emphasized "that the elements to be proved to establish a violation of Section 14(e) are identical to those under the Rule." *Id.* at 606. And Judge Friendly, commenting on the Section 14(e) scienter question in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 n. 17 (2d Cir. 1973), suggested that since "Congress in 1968 adopted the language of Rule 10b-5" in Section 14(e), the same scienter standards should apply. Two years ago, CCI told this Court the same thing: "Section 14(e) embodies the same principles, and indeed the same language as Rule 10b-5, which is the subject of a huge body of case law." *Respondent's Brief in Opposition to Certiorari, Piper* v. *Chris-Craft Industries, Inc.*, 414 U.S. 910 (1973).

The conclusion that Congress intended that the same scienter requirement govern private damage actions under Section 14(e) and Rule 10b-5 is plainly the right one. The language and legislative history of Section 10(b) indicate, as noted in *Hochfelder*, that Congress was contemplating only "intentional or willful conduct designed to deceive or defraud investors." 96 S. Ct. at 1384. The administrative history of Rule 10b-5 makes it "clear that when the Commission adopted the rule it was intended to apply only to activities that involved scienter." *Id.* at 1390. There is no reason to assume that

Congress in 1968 ignored that history and borrowed the language of Rule 10b-5 for use in Section 14(e) intending it to mean something different from what Congress meant when it enacted Section 10(b) and from what the SEC meant when it promulgated the rule. Indeed, *Hochfelder* itself precludes any such assumption.

The legislative history supports the scienter requirement. Both committee reports on the Williams Act described Section 14(e) as the section dealing with "fraudulent transactions." S. Rep. No. 550, 90th Cong., 1st Sess. 10-11 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968); *cf. Hochfelder*, 96 S. Ct. at 1385-386. And when Congress amended Section 14(e) in 1970, it authorized the SEC to issue rules to implement Section 14(e) and described these rules as relating to "fraudulent, deceptive, and manipulative" acts and practices. *See* S. Rep. No. 1125, 91st Cong., 2d Sess. 2, 4 (1970).*

There is also no logical reason why Congress should be deemed to have imposed a lower scienter standard under Section 14(e) than under Rule 10b-5. If any private damage remedy is available in this case, it is because Section 14(e) is read to extend such a remedy beyond the purchasers and sellers who alone have a remedy under Rule 10b-5. To suggest that the more remote additional plaintiffs brought in by such a reading of Section 14(e) should have a lower burden would overturn the logic of the interrelated and interdependent remedies provisions of the securities laws.

As this Court observed in *Hochfelder*, in every section of the securities laws that provides expressly for a dam-

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* At the same time Congress described Section 14(e) as providing "investor protection against *fraudulent* activities in connection with these acquisitions [of control] and tender offers." S. Rep. No. 1125, 91st Cong., 2d Sess. 2 (1970) (emphasis added).

age remedy, Congress prescribed the required standard of culpability. 96 S. Ct. at 1388. Except for the short-term trading prohibition applicable to a very limited group, each such section "contains a state-of-mind condition requiring something more than negligence." *Id.* at 1388 n.28. When Congress did expressly permit liability to be imposed for less than willful misconduct, it carefully limited the defendant's potential exposure by defining the substance of the cause of action, the required relationship between the parties, the measure of damages, and the applicable procedural protections. *See* 1933 Act, §§ 11, 12(2), 15, 15 U.S.C. §§ 77k, 77*l*(2), 77o (1970); *cf. Hochfelder*, 96 S. Ct. at 1388-89. By contrast, where it did not limit the defendant's exposure to liability in all these ways, Congress required proof of willfulness. *See* 1934 Act, §§ 9, 18, 20, 15 U.S.C. §§ 78i, 78r, 78t (1970); *cf. Hochfelder*, 96 S. Ct. at 1388-89 n. 28.

In *Hochfelder* this Court emphasized the need to assure that any implied causes of action for damages are consistent with the pattern of express civil damage remedies. Since the implied actions do not contain the procedural restrictions the express ones do, retaining scienter as an element of implied private causes of action is appropriate:

> We think these procedural limitations indicate that the judicially created private damage remedy under § 10b—which has no comparable restrictions—cannot be extended, consistently with the intent of Congress, to actions premised on negligent wrongdoing. Such extension would allow causes of action covered by § 11, § 12(2), and § 15 to be brought instead under § 10(b) and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these ex-

press actions. 96 S. Ct. 1389 (footnotes omitted).*

The present case illustrates the point perfectly. BPC's exchange offer was registered under the 1933 Act. For any material omission from the registration statement, BPC and its directors are liable to all purchasers under Section 11 and BPC is liable to direct purchasers under Section 12(2). CCI cannot recover under those sections because it was not a purchaser, did not rely on or buy or sell at a price affected by any misrepresentation, and sought damages vastly in excess of the statutory limits imposed by those sections, for an injury traceable to other causes. CCI seeks to avoid all these difficulties by suing under Section 14(e); but it invokes the same "mere awareness" standard of culpability that suffices under

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* As noted in *Hochfelder*, 96 S. Ct. at 1388 n.28, the standard of culpability required to maintain a damage action under the proxy statement provision of the 1934 Act, Section 14(a), 15 U.S.C. § 78n(a) (1970), has not been established, but some lower courts have allowed damage actions against management "by the shareholder recipients of a materially misleading proxy statement" without scienter, because of the "important difference between the operative language and purpose of" the proxy provision as compared with Section 10(b). *See Gould* v. *American-Hawaiian Steamship Co.*, [Current] CCH Fed. Sec. L. Rep. ¶ 95,512 at 99,597 (3d Cir. 1976); *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973).

The "operative language" of Section 14(a) prohibits solicitations of proxies "in contravention of such rules and regulations as the Commission may prescribe . . . ." It differs sharply from the "evil-sounding language," *Gerstle*, 478 F.2d at 1299, of Section 10(b) and Section 14(e). The word "fraud" is not used in the proxy provision or rules; in contrast, Congress explained Section 14(e) as a "fraudulent transactions" section. Section 14(a) is at the heart of management's obligation to make a periodic accounting to shareholders for its discharge of its quasi-fiduciary duty, which is why Judge Friendly concluded even before *Hochfelder* that permitting shareholders to sue for mere negligence under Section 14(a) is consistent with the fact that "scienter must be proved in a private action under Section 14(e)," *Gerstle*, 478 F.2d at 1299 n.17.

Section 12(2). Permitting it to do so would nullify carefully drawn substantive, as well as procedural, limitations.

III. The Court of Appeals Wrongly Interpreted This Court's Decisions in the *Mills* and *Ute* Cases To Create a Conclusive Presumption That BPC's Exchange Offer Would Not "Have Attracted Any Takers" Without the BAR Omission and Wrongly Assumed, in the Face of Contrary Findings by the District Court, That BPC's Acts Caused CCI To Lose the Control Contest.

Traditional principles of tort law require a plaintiff who seeks damages to show not only that the defendant violated a duty but also that the violation caused compensable injury. *See Restatement (Second) of Torts* §§ 9, 430 (1965); W. Prosser, *Law of Torts* § 41 (4th ed. 1971). This Court has consistently recognized that proof of causation of injury is essential before relief will be awarded under the securities laws. *E.g., J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964); *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 62-65 (1975).

In the present case, this "causal nexus" between violation and injury has two elements. First, CCI could not have been injured by the BAR omission in the BPC exchange offer unless a significant number of tendering Piper shareholders relied on it in the sense that they would not have accepted BPC's exchange offer had they known of the possible sale of the BAR. Second, even if there was reliance in this sense, neither the BAR omission nor the Rule 10b-6 violation caused injury to CCI unless the outcome of the contest would have been different had the violations not occurred. Both these links needed to be proved.

The district court found, after trial, that CCI had failed to establish "a reasonable probability that its de-

feat and damage were connected with the claimed violations." (A-145) With respect to the possibility of reliance on the BAR omission, the district court said:

> There is no proof that a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta. (A-145)

With respect to the alleged Rule 10b-6 violation, the district court found "not a scintilla of evidence that any Piper holder was misled" (A-151) and no proof that it decided the contest:

> Even granting that the block purchases resulted arithmetically in Bangor Punta's achievement of control, there is no basis for concluding that, absent Bangor Punta's acquisition of these blocks, Chris-Craft would have achieved its goal of control. Thus the record will not support a contention that Bangor Punta should, by reason of violation of Rule 10b-6, compensate Chris-Craft for the latter's failure to gain control of Piper. (A-150)

The court of appeals did not even suggest that these findings were erroneous. Indeed, it was prepared to "assume arguendo that BPC's offer was superior to that of CCI, taking into account the BAR loss . . . ." (A-60) However, it then misread this Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), to require that damages be awarded anyway.

The court made two fundamental errors. First, in connection with the BAR omission, the court thought that *Mills* and *Ute* required it to presume conclusively, on behalf of a third party, that every tendering Piper share-

holder would have rejected the BPC exchange offer had this "unintentional" error not been made. Second, the court of appeals disregarded the fact that even if there were a presumption of reliance by Piper shareholders, CCI still failed to show that this presumed reliance or the technical Rule 10b-6 violation caused it to lose the control contest, the injury for which it was compensated.

A. *There Was No Basis for a Conclusive Presumption That BPC's Exchange Offer Would Not "Have Attracted Any Takers" Without the BAR Omission.*

All other issues aside, CCI was not in fact injured by the BAR omission unless the Piper shareholders who accepted BPC's exchange offer relied on the omission in the sense that they "would have been influenced to act differently than [they] did act if [BPC] had disclosed to [them] the undisclosed fact." *List* v. *Fashion Park, Inc.*, 340 F.2d 457, 463 (2d Cir.), *cert. denied sub nom. List* v. *Lerner*, 382 U.S. 811 (1965); *see also Dopp* v. *Franklin Nat'l Bank*, 461 F.2d 873, 880 (2d Cir. 1972); *cf. Simon* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 884 (5th Cir. 1973). The district court found CCI had failed to prove reliance by the Piper shareholders. The court of appeals obligingly granted CCI a presumption that BPC's exchange offer would not "have attracted any takers" (A-60) had the possible sale of the BAR been mentioned. This was based on a misreading of *Mills*.

Mills was a suit by shareholders claiming that a proxy statement used by management to solicit their votes for a merger was misleading because it failed to disclose a relationship between management and the proposed merger partner. The court of appeals had ruled that even though this was a material omission it did not affect the

fairness of the merger, and the defendants should have judgment if the terms were fair in fact. This Court reversed and remanded on the ground that this procedure would "allow shareholders to be bypassed" in favor of "a judicial appraisal of the merger's merits." 396 U.S. at 381.

The Court did not create or endorse any presumption, conclusive or otherwise, about how the shareholders would have behaved had they been fully informed. On the contrary, it held that there was "no justification for . . . [the] presumption . . . implicit in the opinion of the Court of Appeals," that the shareholders would have voted for the merger if its terms were fair. 396 U.S. at 382 n. 5. But since the central purpose of Section 14(a) was "[f]air corporate suffrage," *id.* at 381, the Court held that the "[u]se of a solicitation that is materially misleading is itself a violation of law . . . ." *Id.* at 383. The shareholders were entitled to a proper proxy statement before their votes could be validly used, and speculation about how they would have voted was irrelevant. In short, reliance was not presumed; it was simply unnecessary to the conclusion that the shareholders had been wronged by the use of their proxies obtained by a deficient solicitation. *See Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 289 (3d Cir.) (Adams, J., concurring and dissenting), *cert. denied*, 409 U.S. 874 (1972).

The present case is altogether different. CCI is not a shareholder vindicating its absolute legal right to a proper proxy statement regardless of any showing of what it would in fact have done. The injury for which CCI was compensated does not even exist unless it is established, at a minimum, that BPC would not in fact have obtained, and that CCI would in fact have obtained, Piper shares

tendered to BPC in its exchange offer. CCI's case depended, logically, on proof that the BAR omission actually affected what a large number of the tendering Piper shareholders did. *Mills* is not a substitute for that proof.

If *Mills* has any application outside proxy cases, the district court here did full justice to *Mills* when it ordered BPC to offer rescission to the tendering Piper shareholders. They were the persons who were allegedly injured (although none of them ever brought suit) by a prospectus deficiency without which they "might have hesitated" (D-15) to tender their shares. The district court therefore ordered that the prospectus "be corrected for those to whom it related" (A-143), in accordance with Section 14(e)'s stated purpose of requiring offerors to make full disclosure "to those with whom they deal." S. Rep. No. 550, 90th Cong., 1st Sess. 11 (1967).

The court of appeals' presumption that the Piper shareholders would have rejected BPC's offer (which is the only basis on which the court could find injury to CCI, a third party) was not justified either by findings of fact or by *Mills*. The Court that decided *Mills* would have been astounded by the proposition that a competing suitor, seeking a different merger with the target company, could automatically recover damages by proving the omission and then invoking a conclusive "presumption" that the merger would have failed. Yet that is exactly analogous to what the court of appeals did here when it said on behalf of CCI:

> Under the *Mills-Ute* test we must presume that BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers . . . . (A-60)

The court of appeals mistakenly sought confirmation of its reading of *Mills* in this Court's decision in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). That too, is a case in which reliance was not presumed but was logically unnecessary. Certain Indians brought suit against bankers who acted as custodians of shares of stock owned by the Indians. The bankers, who were "acting for the individual stockholders" and thus had fiduciary responsibilities to them, deliberately "devised a plan" that "operated as a fraud" on the Indians by "induc[ing]" them to dispose of their stock at less than its fair value. *Id.* at 152-53. This scheme cheated the Indians without regard to whether they relied on any particular misinformation.*

The key to the court of appeals' misapplication of *Mills* and *Ute* is the different status of CCI from the plaintiffs in those cases and the different nature of the injury for which CCI is seeking damages. This case is not concerned with vindicating the right to a prospectus: the Piper shareholders who exchanged their shares and now hold BPC securities are not the plaintiffs in this case but, in effect, defendants hoist by a presumption of their own reliance. CCI, a stranger to the transaction, seeks to recover damages on the ground that it was affected when *they* were misled into acting differently than they otherwise would have.** But a competing offeror like

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* The Court did say that the bankers had violated Rule 10b-5(2) by understating at least one material fact—the prevailing market price of the shares. It is hardly necessary to "presume" whether a seller would have sold if he had known that a higher price was available in the market. In any event, carefully limiting its ruling to "the circumstances of this case," the Court made it clear that the decision turned not on the specific misstatement but the overall scheme, and that was why reliance was unnecessary. 406 U.S. at 153.

** The court of appeals relied on its own earlier decision in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969),

CCI has shown no injury at all unless and until it establishes that a significant number of shareholders would have acted differently. Evidence of this is by no means impossible to obtain,* and should be required under this Court's direction in *Mills* that "damages should be recoverable only to the extent that they can be shown." 396 U.S. at 389.**

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cert. denied, 400 U.S. 822 (1970), to support its conclusion that CCI could recover without proving that in fact a significant number of shareholders would have acted differently. Neither *Crane* nor the case it relied on, *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), *cert. denied,* 389 U.S. 970 (1967), creates a presumption of reliance by shareholders. Those cases merely permit a plaintiff who was not himself deceived to recover if a "deception which misled" others is "shown" and if "this was in fact the cause of plaintiff's claimed injury." *Vine,* 374 F.2d at 635, quoted in *Crane,* 419 F.2d at 797. *Vine* involved the sufficiency of the complaint, so the allegation of reliance by others was taken as true. *Crane,* as the district court here pointed out (A-146), involved a fact situation in which the target company shareholders were unquestionably misled into not tendering. The defendant there violated Section 9(a)(2) of the 1934 Act and Rule 10b-5 by deliberately engaging in offsetting transactions that artificially inflated the price of the target company's stock above the tender offer price on the crucial last day of Crane's tender offer. The court of appeals in *Chris-Craft II* simply ignored this crucial factual distinction.

* For example, to the extent that there are large institutional holdings, there is readily available direct evidence of whether significant blocs would have been tendered. *See also, e.g., Kohn* v. *American Metal Climax, Inc., supra,* 458 F.2d at 288 (Adams, J., concurring and dissenting); Cobine, *Elements of Liability and Actual Damages in Rule 10b-5 Actions,* 1972 U. Ill. L. Forum 651, 688-89.

** A showing of materiality alone does not provide the needed factual link because, as the concept was applied here, there is no good reason to think any Piper shareholders were influenced by the BAR omission at all. No exchanging shareholder either sued BPC or accepted the offer of rescission. The district court said that "[t]he standard of materiality to be applied here is whether a reasonable stockholder of Piper *might* have *hesitated* to make an exchange for Bangor Punta securities" had the BAR negotiations been fully disclosed. (D-15, emphasis added) The court of appeals affirmed. (A-45-46) While a finding that some shareholders "might

Even if *Mills* and *Ute* could be extended to give a third party a presumption about how someone else would have acted under other circumstances, nothing in those decisions justifies making the presumption conclusive, as the court of appeals did here. Even the policy of "vigorous enforcement" of the securities laws does not support damages for injury the defendant did not cause.* If problems of proof are thought to support a presumption as a starting place in appropriate cases, there is no excuse whatever for excluding contrary evidence. *See* Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 Harv. L. Rev. 584, 597-600 (1975). Other courts of appeals faced with the issue have permitted the defendant to prove the absence of reliance. *See Rochez Bros., Inc.* v. *Rhoades*, 491 F.2d 402, 410 (3d Cir. 1974); *Chelsea Assoc.* v. *Rapanos*, 527 F.2d 1266 (6th Cir. 1975); *Carras* v. *Burns*, 516 F.2d 251, 257 (4th Cir. 1975). But here, BPC was given no opportunity to rebut the court of appeals' presumption by showing that there were Piper stockholders who would have accepted the exchange offer had they known of the BAR offer. *Compare Blackie* v. *Barrack*, 524 F.2d 891, 906 (9th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3518 (U.S. Mar. 16, 1976). The court of appeals simply reversed the district court's finding that CCI failed to prove

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have hesitated" to have exchanged with BPC may be enough to require that the fact be disclosed to the offerees and even that they be given the opportunity to rescind, *see Northway, Inc.* v. *TSC Industries, Inc.*, 512 F.2d 324 (7th Cir.), *cert. granted*, 423 U.S. 820 (1975), *argued*, March 3, 1976, it is hardly an adequate basis to support a presumption that BPC "obtained control through its violations of the securities laws." (A-56)

* Under Section 11 of the 1933 Act, 15 U.S.C. § 77k (1970), for example, a defendant can avoid liability by proving that the plaintiff could not have relied on the misstatement or omission because the plaintiff knew of it.

reliance by the Piper shareholders; it did not remand to give BPC a chance to show the absence of reliance. *See Herbst* v. *International Tel. & Tel. Corp.*, 495 F.2d 1308, 1316 n. 14 (2d Cir. 1974).

B. *There Was No Proof That BPC's Alleged Missteps Caused the Injury for Which CCI Was Compensated.*

The injury for which CCI was compensated was denial of control of Piper. The injury the court of appeals purported to find was denial of an opportunity to compete for control. To show that BPC's alleged missteps actually denied it control, or even the opportunity for control, CCI should have been required to establish that it had a reasonable prospect of gaining control absent the violations. In fact, even granting the court of appeals' presumption that without the BAR omission not a single Piper shareholder would have tendered to BPC in its exchange offer, such a presumption does not establish that the BAR omission (or the Rule 10b-6 violation) affected the outcome.

There was no proof that CCI would have won under any circumstances. The district court found, and the court of appeals agreed, "that CCI failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations" alleged. (A-56) The court of appeals ignored the question of actual effect and relied solely on the truism that if 14% out of BPC's 51% were left out of account BPC would have less than 51%; it disregarded the fact that the shares would have remained available, that BPC had the resources and the will to buy them, and that CCI did not. As to the BAR omission, the court of appeals' entire analysis of causation was as follows:

> Since BPC eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success. Reliance and causation have been shown. (A-60)*

The court of appeals took a similarly mathematical approach to the impact of the supposed Rule 10b-6 violation. (A-67, A-96, A-111)

This simplistic reasoning disregarded the fact that the control contest was not a race but an auction, won, as it should have been, by the higher bidder. CCI had virtually exhausted its cash and borrowing capacity by spending about $35 million by February 4. (A-113-15, 128) BPC, whose large initial acquisition from the Pipers three months later was made for securities, always had more cash, more borrowing power (see A-113-15) and, since disclosure of the BAR transaction had no negative effect on their value (App. 591), more valuable securities to offer. Each of CCI's tender offers (unlike BPC's) was for a limited number of shares; the first one, which was for far fewer shares than needed for control, brought CCI "more shares than it agreed to buy." (A-113) Once BPC entered the contest, it consistently outbid CCI. (A-140 n. 10) Finally, CCI "withdrew from the struggle" (A-18) before BPC had a majority.

In light of these facts, and others, the district court quite properly found no "causal relation between the deficiency [in the prospectus] and the harm complained of" (A-144), and "no basis for concluding that, absent

* The reason BPC got "only about 51%" is, of course, that it voluntarily stopped buying when it reached that figure in September. When BPC stopped buying, about 7% of Piper stock was in public hands. If BPC had gone on to buy these shares the exchange offer would not have been "critical to its success."

Bangor Punta's acquisition of these [Rule 10b-6] blocks, Chris-Craft would have achieved its goal of control." (A-150) CCI lost because it had "'shot its bolt' in the financial sense by early February 1969" and "was in no position to purchase for cash any appreciable amount of Piper shares" thereafter. (A-114) (Mansfield, J., concurring)

CCI should have had the burden of proving that BPC's acts materially affected the outcome of the contest, *see* *Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 28-29 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972); *cf. Lowenschuss* v. *Kane*, 520 F.2d 255, 269 (2d Cir. 1975), but in fact there were judicial findings at precisely the critical moment that the contest was still open. In August 1969, after both of BPC's alleged missteps, CCI sought a preliminary injunction restraining BPC from, *inter alia*, accepting the shares tendered in response to its exchange offer or buying additional Piper shares. The district court denied the injunction, expressly finding that the contest for control was then still open and both sides had a chance of victory. The court said:

> With approximately 259,026 shares of Piper still in the hands of the public, it would appear that at this time neither Chris-Craft nor Bangor Punta has succeeded in gaining control of Piper. (C-38)
>
> Neither party has gained control of Piper, and both are still in a position to do so. (C-47)

The court of appeals en banc affirmed the denial of a preliminary injunction, agreeing with the district court that the contest was still open:

> [W]e conclude that the district court did not err in refusing to enjoin the continued solicita-

> tion of stock by Bangor Punta. At that time Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage. (C-9)

The court of appeals reaffirmed this conclusion in its later opinion on liability. It observed that, after the competing exchange offers had expired,

> The contest for control was not yet over, . . . because after the expiration of both offers CCI and BPC owned only 41% and 45%, respectively, of the outstanding Piper shares. (A-18)

Although not "at any real disadvantage" in August, CCI lost the contest in the succeeding weeks, when BPC lawfully purchased additional shares in the open market, while CCI lacked the cash or the will to do so:

> CCI made additional purchases of 29,200 shares between August 12 and 18, and then virtually withdrew from the struggle. BPC, on the other hand, continued to purchase for cash . . . . By September 5, it had acquired another 100,614 shares, enough to achieve a majority stockholder position in Piper (839,306 shares or 51%). (A-18)

As Judge Mansfield summed it up:

> [I]t was BPC's cash purchases in the open market of 100,614 shares, as compared with CCI's *capacity* to buy only 29,200 shares, that won control for BPC. (A-116) (emphasis added)

On these facts, there was clearly no showing that the alleged violations denied CCI control of Piper, the injury for which CCI was compensated, or even the chance to compete for control. The court of appeals, however, again invoking *Mills*, simply ignored the need for a causal connection between the violation and the injury for which the plaintiff is compensated.*

Nothing in *Mills* or any other decision of this Court justifies, much less compels, this jump.** *Mills* is perfectly clear about the need to show causation of actual injury before the plaintiff can obtain further relief: "[D]amages should be recoverable only to the extent that they can be shown." 396 U.S. at 389.*** Any doubt about the

* And once again, the court made the presumption conclusive. The district court thought CCI had a burden of proving causation and had failed to meet it. (A-144) The court of appeals simply reversed (A-60), giving BPC no opportunity even to offer contrary evidence.

** The court of appeals invoked the *Crane* case, discussed in the note at p. 73, *supra*, to support its finding of causation, but here overlooked the fact that *Crane* allowed the plaintiff to recover damages only if the manipulation should be found on remand "to have deprived it of success in its tender offer." 419 F.2d at 803. And in *Crane* v. *American Standard, Inc.*, 490 F.2d 332 (2d Cir. 1973), a subsequent effort by the court to unravel the "procedural imbroglio," *id.* at 334, that had developed, Judge Friendly specifically instructed the district judge that in determining whether Crane should be awarded damages:

> Certainly it is not to be merely assumed that but for Standard's acts on April 19, 1968, Crane's tender offer would have succeeded and the merger would have failed. *Id.* at 344.

Citing this Court's opinion in *Mills*, he added that,

> Quite conceivably a judge here might find the chain of causation so dubious and the task of determining damages so elusive as to lead him to decide that, except for some items that may be readily provable, he could not properly award anything save perhaps attorneys' fees. *Id.*

*** In *Dasho* v. *Susquehanna Corp., supra*, 461 F.2d at 31, for example, the Seventh Circuit held that *Mills* stood for the proposi-

need for positive proof of causation was expunged by this Court's decision in *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 64 (1975) where the Court said:

> *Mills* could not be plainer in holding that the questions of liability and relief are separate in private actions under the securities laws, and that the latter is to be determined according to traditional principles.

The present case is one in which the causation issue is a critical one. Judge Friendly made that point in *Zeller* v. *Bogue Electric Mfg. Corp.*, 476 F.2d 795 (2d Cir.), *cert. denied*, 414 U.S. 908 (1973), where the plaintiff sought damages for, among other things, the lost benefits of an underwriting it claimed it could have participated in but for the defendant's unlawful actions. These "consequential damages" for a lost opportunity, he said, could be recovered only if the plaintiff could "establish the causal nexus with a good deal of certainty." *Id.* at 803.

Rather than follow this sound course (as it did on the subsidiary issue of whether CCI could recover interest expense, *see* B-34-35), the court of appeals here wrongly assumed that BPC's challenged actions caused CCI's alleged injury. Since CCI never showed that there was any "reasonable probability that its defeat and damage were connected with the claimed violations" (A-145), it should have been denied monetary relief.

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tion that flawed proxy material meant that the approval of the merger "was unlawfully obtained," but "that approval caused [plaintiff] monetary injury only if (a) [the company in which plaintiff was a stockholder] would have been better off with no merger at all; or (b) a more favorable exchange ratio would have been available if there had been full disclosure."

IV. The Court of Appeals Awarded CCI an Amount That Far Exceeds CCI's "Actual Damages on Account of the Act Complained of."

Even if the court of appeals had been right in holding that CCI had standing to sue, did not have to show intent to defraud, and was the beneficiary of conclusive presumptions of both reliance by Piper shareholders and causation of injury, it was wrong when it calculated CCI's damages. The court of appeals lost sight of the command of Section 28(a) of the 1934 Act: CCI's recovery must be limited to its "actual damages on account of the act complained of," 15 U.S.C. § 78bb(a) (1970). *See* H.R. Rep. No. 1383, 73d Cong., 2d Sess. 28 (1934).*

The fundamental flaw in the court of appeals' damages decision is that it was not based on the injury supposedly done to CCI. The "act complained of" here was the presumed interference with CCI's "fair opportunity to compete for control of Piper." (A-60) Accordingly, if CCI suffered any "actual damages," the proper way to measure them is to determine the value of control of Piper and to discount that figure to reflect CCI's prospects of actually gaining control. *See generally* W. Prosser, *Law of Torts*, § 130 at 950 (4th ed. 1971); C. McCormick, *Law of Damages*, § 31 at 117-23 (1935); Note, *Developments in the Law—Damages*, 61 Harv. L. Rev. 113, 123 (1947); *cf. Gould* v. *American-Hawaiian Steamship Co.*, [Current] CCH Fed. Sec. L. Rep. ¶ 95,512 at 99,601 (3d Cir. 1976); *Domine* v. *Grimsdall*, [1937] 2 All E.R. 119 (K.B.); *Wachtel* v. *National Alfalfa*

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* *Cf., e.g., Green* v. *Wolf Corp.*, 406 F.2d 291, 303 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) (punitive damages cannot be awarded under Section 28(a) since Congress did not intend to permit "recovery of judgments that could often be grossly disproportionate to the harm done").

Journal Co., 176 N.W. 801 (Iowa 1920). The SEC seems to agree with this principle. *See Brief for the United States as Amicus Curiae on Petitions for Certiorari* at 22.

The district court took essentially this approach following the remand in *Chris-Craft II*. In analyzing the court of appeals' instructions,* the district court properly concluded that since the injury was a supposed interference with CCI's chance to gain control, the recovery should equal the "value" of that "opportunity." (B-52) The district court's first step was to calculate "the value of ultimate control of Piper." (B-57) There were severe limitations on the value of control under the circumstances. The district court noted that "the controlling person may not baldly misappropriate this power for his own interests at the expense of the corporation" (B-60) and that, "[i]n the atmosphere of recently decided cases, especially where a vocal opposition exists, the exercise of control is bound to be seriously hedged by restrictions protective of minority interests." (B-63)**

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* The court of appeals in *Chris-Craft II* had said:

> The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time. (A-69)

In the context of a statutory appraisal proceeding, this formula would have produced no damages since the appraisal value of one aspirant's holdings of the target's stock would not be any different after the other aspirant acquired control than before. The district court rejected this approach, however, and awarded substantial damages based on the value of CCI's lost opportunity.

** This Court recently made the same point in a different context, saying in *United States* v. *Byrum*, 408 U.S. 125, 137 (1972) (footnote omitted): "A majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests."

Nevertheless, the district court found that under the circumstances a controlling bloc of Piper might have commanded a 5% to 10% premium over the fair market value of the shares at the relevant time. Since the evidence showed that the fair market value of Piper stock was $48.00 on September 5, 1969, the district court found that the value of control on that date was $4.80 per share.* *Cf. Perlman* v. *Feldmann*, 154 F. Supp. 436, 447 (D. Conn. 1957) (control premium determined by first determining fair market value). The district court then discounted that value because CCI lost at most only the opportunity to compete for control against a determined, well-financed aspirant with a large bloc of lawfully acquired shares. This lost opportunity was "generously valued" at $2.40 per share. (B-70) CCI was awarded that amount on each share of Piper it bought during and before the contest, for a total award of $1.6 million.

The court of appeals in *Chris-Craft III* declared this award "quite insubstantial" (B-17) and instead gave CCI a judgment for $25.8 million, fifteen times the value of its lost opportunity as found by the district court. This extraordinary result was premised on a formula that required BPC to pay to CCI

> . . . the difference between the price CCI paid for its Piper stock . . . and the price it could have obtained for it through a public offering after BPC unlawfully acquired control . . . . (B-31)

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* The ability of a holder of a control bloc to obtain a greater per-share price than non-controlling shareholders is not unquestioned. Professor Andrews, for example, has suggested that the right rule is one which requires that minority stockholders be given an equal opportunity to sell on the same terms as the control bloc is sold. Andrews, ***The Stockholder's Right to Equal Opportunity in the Sale of Shares***, 78 Harv. L. Rev. 505 (1965).

The court of appeals tried to make this formula serve as a measure of the actual decline in the value of CCI's holdings caused by BPC's obtaining control, but it does no such thing. The *Chris-Craft III* formula is really a rescission measure of damages. It makes BPC an insurer of CCI's pre-contest position, even though BPC did not induce CCI to purchase a single Piper share and even though the post-contest market decline was unrelated to "the act complained of." It gives CCI more than CCI would have if it had won the contest. It was plain error.

One mistake in the *Chris-Craft III* formula was using the supposed historical cost ($64) of CCI's Piper shares as the minuend.* Not even the court of appeals thought that CCI had a right to be indemnified for this voluntary expenditure. Instead, the court justified using a historical cost figure by saying that the value of CCI's Piper shares just before BPC acquired its majority position may have included a premium reflecting CCI's chance to gain control, and so had to be at least equal to CCI's average historical cost. (B-25-26) This was simply untrue. CCI had bought these shares at various prices, for cash and in exchange for securities, over the preceding eight months, during part of which time the control contest raged.** By September 5, 1969, according to the district court's findings, the fair market *value* of a Piper share,

* Actually, the $64 figure was the book value of the shares and included expenses (such as attorney's fees and carrying costs) for which CCI was not entitled to be compensated even under the *Chris-Craft III* decision. However, since the court of appeals refused to remand for a hearing, BPC was never able to introduce evidence on this point. *See* p. 92, *infra.*

** Of course, the price an aspirant for control may be willing to pay for a target company's shares at one point in a contest does not demonstrate their value at a later point. *Pierre J. LeLandais & Co.* v. *MDS-Atron, Inc.*, No. 75-7108 (2d Cir., May 5, 1976) (slip op. at 3538) (Timbers, J.).

even as part of a control bloc, was at most \$52.80 (B-57, 70), at least \$11 less than CCI's supposed *cost*. Since CCI had paid far more than \$52.80 for its Piper stock, it had made a bad investment; but the economic loss it suffered cannot be attributed to BPC, which suffered the same loss.*

Another and even more substantial mistake was using as the subtrahend the hypothetical selling price (\$27) of CCI's Piper shares in January 1970, five months after BPC gained control and the alleged injury was done. The long delay was based on an assumption—never briefed or argued—that CCI would have had to register its Piper shares and that it would take that long to do it.** But the January 1970 price obviously does not show what the value of a minority bloc of Piper was at the time BPC gained control in September. The effect of using the January 1970 sale price here was to compensate CCI for the steep market decline in stocks generally and in light-aircraft stocks in particular, even though that decline was unrelated to any act of BPC's. The SEC

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* Learned Hand's dictum in *Borg* v. *International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925), to the effect that the value of shares is what people will pay for them does not, as the court of appeals here thought (B-22), establish as a matter of law that no securities plaintiff ever mistakenly pays too much. It does not, for example, moot the provision of Section 11(e) of the 1933 Act, 15 U.S.C. § 77k(e) (1970), expressly permitting proof that plaintiff overpaid for his stock. And it clearly does not support the notion that CCI's Piper shares had to be worth on September 5, 1969, what CCI had previously paid for them.

** Registration would be required only if CCI were deemed a "controlling person" of Piper in spite of the fact that it lost the control contest. *See* Sections 2(11), 4(1) and 5 of the 1933 Act, 15 U.S.C. §§ 77b(11), 77d(1) and 77e (1970). A recognized authority in this area has said that registration would not be required in a situation like the one here, since BPC, not CCI, had achieved control. E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 216 (1973).

agrees with this, as it must, for it conceded to this Court in opposing certiorari that

> . . . the use of the January 1970 date appears to compensate Chris-Craft for a loss caused by a post-injury decline in the market value of Piper stock of approximately $15 per share—a loss that Chris-Craft would have sustained even if [BPC] had not violated the securities laws and, indeed, even if Chris-Craft itself had succeeded in the contest for control . . . . *Brief for the United States as Amicus Curiae on Petition for Certiorari* at 23, n. 14.

BPC, the "winner," suffered the very same per share "damages"—the post-contest market decline—the court of appeals ordered it to pay CCI as part of the compensation for losing.*

Compensating CCI for unrelated market declines in an implied cause of action stands in stark contrast to the recovery allowed by Congress in express causes of action under the securities laws. Suppose a case far worse than this one: a false prospectus on the basis of which the plaintiff decides to buy. This defrauded buyer has an express cause of action under Section 11 of the 1933 Act. But he cannot be awarded damages for economic losses due to a general market decline because Section 11 itself, 15 U.S.C. § 77k(e) (1970), prevents recovery for "the depreciation in value of" a security due to factors other than an untruth or omission in the prospectus.** Surely

* Conversely, if the market value of Piper stock had increased, the difference between winning and losing would be greater, but there would be no damages at all under the *Chris-Craft III* formula.

** *Feit* v. *Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544, 586 (E.D.N.Y. 1971), a Section 11 case, demonstrates the point well. In measuring damages, the court took "judicial notice of the very

the same result should have been reached in a new judicially implied cause of action under which the plaintiff can, by congressional command, recover only his "actual damages on account of the act complained of."

Finally, the court of appeals seriously erred in failing to reduce the award to take into account the fact that CCI lost, at the very most, only an opportunity to compete for control of Piper against a vigorous and well financed opponent that had the support of the target's management. As the SEC has told this Court, a failure to adjust damages to reflect the reality of CCI's chance to gain control risks "substantial overcompensation of the defeated contestant," which lost only its "expectancy." *Brief for the United States as Amicus Curiae on Petition for Certiorari* at 22. By refusing to discount to reflect CCI's chance of gaining control of Piper, the court of appeals in effect assumed—despite the overwhelming evidence to the contrary and its own (and the district court's) opinions over the previous six years —that CCI would have won the contest in the absence of BPC's questioned acquisitions.*

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drastic general decline in the stock market in 1969" and held that the "damage figure should be adjusted to take account of the market decline."

* The court of appeals had one specific criticism of the way the district court actually did its calculations. The district court found the fair market value of Piper stock—$48 per share—by analyzing "the objective components of that value, as recognized by the experts" on the basis of "an anonymous 100-share block . . . ." (B-52) The court of appeals said it should have taken account of the fact that "CCI held an illiquid 700,000 share minority block" (B-19), whose value the court assumed must be less per share than the value of a 100-share bloc.

The court of appeals was wrong on both the law and the facts. CCI was neither induced to buy nor forced to sell Piper shares, has never in fact sold them, and retains the intrinsic value of its investment in Piper. The most it suffered was interference with its opportunity to gain control. Any imagined effect on the intrinsic value

The cases the court of appeals cited to support the *Chris-Craft III* damage formula were far different from this one. *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970), involved a stockbroker that recommended and sold over-the-counter stock to the plaintiff without disclosing that it was making a market in that stock, and so stood to benefit more from the sale of this stock than other stock. The plaintiff relied on the broker's "strong recommendations" without knowing of the broker's self-interest. *Id.* at 1172. Under the usual federal securities law measure of damages, which awards the plaintiff the difference between the price paid (or received) and the real value of the stock on the date of the transaction,*

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because of the illiquidity of a large bloc will affect both a 51% bloc and a 42% bloc and is unrelated to the value of the lost "opportunity."

Nor did the court of appeals take into account that BPC did not have meaningful control. BPC held 51% of the Piper stock to CCI's 42%, but BPC had been ordered to offer rescission as to 7%, and not to vote that 7% and another 7% for five years; injunctions also prohibit any merger and any change in Piper's charter or by-laws or the size of its Board. (B-71-75) As a result of cumulative voting, BPC could elect only four out of Piper's eight directors. (B-50, n. 6) For all these reasons, the chances that BPC could "compel a merger at any time" (A-69) were in fact non-existent; were BPC to do so, of course, CCI would receive fair value just like any other dissenting shareholder. Under all these circumstances, it was not improper for the district court to use the $48 figure as a basis for determining the value of CCI's 42% bloc as compared to CCI's opportunity, absent BPC's missteps, of acquiring a control bloc.

* *See Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972); *Thomas* v. *Duralite Co.*, 524 F.2d 577, 586 (3d Cir. 1975); *Harris* v. *American Investment Co.*, 523 F.2d 220, 224-25 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 784 (1976); *Zeller* v. *Bogue Elec. Mfg. Co.*, 476 F.2d 795, 801-03 (2d Cir.), *cert. denied*, 414 U.S. 908 (1973); *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith*, 303 F.2d 527, 533 (10th Cir. 1962); *cf. Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1307 (2d Cir. 1973).

the plaintiff in *Chasins* might have recovered nothing, since he had apparently paid the lowest generally available price. *Id.* at 1173; *cf. id.* at 1176 (Friendly, J., dissenting from denial of rehearing en banc). The *Chasins* court said that this was irrelevant, however, since the plaintiff's "decision to purchase at all" came "on Smith, Barney's recommendation." *Id.* at 1173. "[T]he fact of being *induced* to buy . . . without disclosure of Smith, Barney's interest" was "the evil" by which damages should be measured. *Id.* (emphasis added). The court therefore approved a rescission measure of damages—the difference between the purchase price and the amount the plaintiff obtained when he sold the stock about a year later. Inducement to purchase was also the injury in *Esplin* v. *Hirschi*, 402 F.2d 94, 104 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969), the other case cited by the court of appeals here.

Even if *Chasins* was rightly decided, it cannot control this case. Rescission or a rescission measure of damages can only be justified where, as in *Chasins*, the plaintiff was induced to act by the defendant's violations. *See, e.g., Gordon* v. *Burr*, 506 F.2d 1080, 1085 (2d Cir. 1974); *cf. Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 761 (5th Cir. 1974).* In that kind of case it may be appropriate to undo the transaction and thus indemnify the plaintiff even for market losses because the wrong is that he was induced to buy at all. *Cf. Myzel* v. *Fields*, 386 F.2d 718, 742 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968) (relying on Section 29(b) of the 1934 Act, which voids contracts made in violation of the Act, to

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* *See generally*, Note, *The Measure of Damages in Rule 10b-5 Cases Involving Actively Traded Securities*, 26 Stan. L. Rev. 371, 372-76 (1974).

award damages based on rescission).* But CCI was obviously not induced by BPC to buy Piper shares. CCI entered the contest before BPC. It must have recognized the risk that, for reasons unrelated to the contest, the market value of the Piper securities it was buying could rise or fall. In these circumstances it was plainly wrong to make BPC bail CCI out of its own "misadventure" (A-160) and restore it to its precontest position. This kind of windfall is what Congress prohibited when it expressly limited a plaintiff's recovery to his "actual damages on account of the act complained of."

Accordingly, if the Court holds that BPC is liable to pay damages to CCI in addition to the equitable relief already granted, it should reverse the court of appeals and order that the judgment of the district court on damages be reinstated.

V. The Court of Appeals' Failure To Remand for a Calculation of Damages and for a Reconsideration of the Award of Prejudgment Interest Denied Petitioners Due Process of Law.

Having developed a new (and erroneous) measure of damages in *Chris-Craft III*, the court of appeals proceeded to calculate damages itself on the basis of the record created under the *Chris-Craft II* formula and then to "affirm" the award of prejudgment interest from about $600,000 to more than $10 million. This circumvention of evidentiary proceedings on newly relevant factual issues was plain error.

In order to calculate CCI's damages under the *Chris-Craft III* formula without remanding, the court of appeals made a number of critical findings of fact without

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* *See also* Weiskopf, *Remedies Under Rule 10b-5*, 45 St. John's L. Rev. 733, 751 (1971).

hearing, testimony, argument, or adequate basis in the record. Among them were that CCI's cost for its Piper stock was $63.98 per share (B-25); that a registration statement would have been required for a public offering of CCI's Piper stock (B-29); that the "earliest realistic date" (*id.*) for such an offering was the end of January 1970; and that in January 1970, CCI would have realized only $27 per share in a public offering. (*Id.*)*

Since the district court had proceeded on an entirely different theory of how CCI's damages should be calculated, the parties had had no warning of the need to present, and had not presented, evidence bearing on those issues. Had it been permitted to offer pertinent evidence, BPC could, for instance, have shown that registration would not have been required for a public offering of Piper stock by CCI and that even if a registration statement had been required it would not have delayed an offering for five months of steady market decline. BPC could also have shown that CCI's alleged cost of $63.98 per Piper share included interest, legal and other expenses not recoverable even under the new test. And BPC could have shown that the price CCI could have obtained for its Piper shares on the date of the hypothetical sale was greater than $27 per share.

To take only one example of how unfair it was to deprive BPC of any opportunity to introduce evidence on these issues, the CCI witness on whose testimony the court of appeals relied for the $27 figure had testified

* The court of appeals did this by selecting excerpts from evidence submitted for other purposes. For example, the last two of these "findings"—critical matters, involving millions of dollars —were based on two paragraphs in the testimony of one CCI witness who was not credited by the district court. (*Compare* B-29 *with* B-64 n.18; *see* App. 2451A; EV 835)

that a public offering in November 1969 (instead of January 1970) would have brought \$33 per share (instead of \$27 per share). (B-29 n. 22) As it happens, \$1 per share translates into about \$1 million in damages and interest. BPC, wholly unaware that the difference between those hypothetical dates would be determinative, was denied a "fair opportunity" to fight for this six million dollars.

In these circumstances, the court of appeals seriously erred in refusing to remand for a hearing. This Court has consistently insisted that due process requires no less. *E.g., Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958). *See also Fountain* v. *Filson*, 336 U.S. 681 (1949); *Marconi Wireless Telegraph Co.* v. *Simon*, 246 U.S. 46 (1918); *Saunders* v. *Shaw*, 244 U.S. 317 (1917).

In *Byrd*, for example, the plaintiff had sued for damages for personal injuries allegedly caused by the defendant's negligence. The defendant had asserted that the claim was barred by the South Carolina Workmen's Compensation Act. The district court struck the defense, ruling that one essential element had not been shown. The court of appeals reversed, holding that the unproved element was not essential and that the defendant had proved all elements that were. It then directed that judgment be entered for the defendant. This Court reversed, holding that the plaintiff, who had introduced no evidence bearing on the other elements of the defense in view of the district court's order granting his motion to strike, was "plainly entitled to have an opportunity to try the issue under the Court of Appeals' interpretation." 356 U.S. at 532. In language applicable to the court of appeals decision in *Chris-Craft III*, Mr. Justice Brennan, writing for the Court, explained:

> The [plaintiff] was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute. *Id.* at 533.

BPC likewise had no occasion ever to have introduced evidence pertaining to the factual issues ultimately held to be determinative by the court of appeals. Neither the statute cited by the court of appeals* nor the cases it relied on** provide any support for denying BPC its day in court on newly relevant factual issues of major importance.

In an effort to justify its decision to calculate CCI's damages itself the court of appeals adverted to "the extraordinary length of time this litigation has already lingered." (B-24, quoting *Georgia-Pacific Corp.* v. *U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295, 299 (2d Cir.), *cert. denied,* 404 U.S. 870 (1971)) But this

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* 28 U.S.C. § 2106 (1970). This statute simply gives this Court and the courts of appeals the power, among other things, to "direct the entry of such appropriate judgment, decree, or order . . . as may be just under the circumstances." It provides no authority for an appellate court to override the elementary requirements of due process.

** None of the cases cited by the court of appeals involved disputed evidentiary issues turning on credibility. *See Dopp* v. *Franklin Nat'l Bank,* 461 F.2d 873, 879 (2d Cir. 1972) (reversing the grant of a preliminary injunction that the district court had entered solely on the basis of pleadings, affidavits and depositions, without taking any oral testimony); *Simpson* v. *United States,* 322 F.2d 688, 693-94 (5th Cir. 1963) (determination of damages involved only "mathematical calculations"); *Dale Benz, Inc.* v. *American Cas. Co.,* 303 F.2d 80, 82 (9th Cir. 1962) (determination of damages involved only "figures and arithmetical calculations"); *McComb* v. *Utica Knitting Co.,* 164 F.2d 670, 674 (2d Cir. 1947) (evidence pertaining to damages consisted solely of a sampling of time sheets).

Court has firmly established that impatience with the demands of fair procedures is no warrant for the abandonment of those procedures. As Mr. Justice Cardozo wrote in *Ohio Bell Telephone Co.* v. *Commission*, 301 U.S. 292, 305 (1937):

> There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement [of a hearing] has been neglected or ignored.

See also Fuentes v. *Shevin*, 407 U.S. 67, 90 n. 22 (1972).*

The injustice to BPC was further compounded by the court of appeals' "affirmance" of the award of prejudgment interest from $600,000 to more than $10 million. Prejudgment interest "is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable." *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962), quoting from *Board of Commissioners* v. *United States*, 308 U.S. 343, 352, (1939).**

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* The procrustean quality of the court of appeals' other rationales for its refusal to remand is striking. While the experts who testified on remand in *Chris-Craft II* submitted written reports, it was altogether wrong to declare for that reason alone that the evidence on damages was "largely documentary." (B-23) On the contrary, the district court in its opinion on relief emphasized the importance of the experts' oral testimony, especially on cross-examination, in deciding what weight to attach to their conflicting testimony. (B-70) The court of appeals also had no right to assume (B-24) that its new formula would not bring forth new evidence. *Saunders* v. *Shaw*, 244 U.S. 317, 319 (1917).

** *Accord, Sanders* v. *John Nuveen & Co.*, 524 F.2d 1064, 1075 (7th Cir. 1975), *vacated on other grounds*, 96 S. Ct. 1659 (1976); *Thomas* v. *Duralite Co.*, 524 F.2d 577, 589 (3d Cir. 1975); *Occidental Life Ins. Co.* v. *Pat Ryan & Assoc., Inc.*, 496 F.2d 1255, 1268-69 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974); *Wolf* v.

The district court had in its equitable discretion found an award of $600,000 in prejudgment interest to be appropriate. The court of appeals purported to be deferring to that judgment (*not* exercising its own discretion) when it affirmed the award into approximately $10 million. (B-33) Yet this same court of appeals had, only a few years before, expressly recognized that the amount involved should be an important consideration in whether such interest should be awarded. *See Norte & Co.* v. *Huffines*, 416 F.2d 1189, 1191 (2d Cir. 1969), *cert. denied sub nom. Muscat* v. *Norte & Co.*, 397 U.S. 989 (1970). Plainly, the award, even if proper in the first place, should have been reconsidered in light of a fifteen-fold increase in the amount.

Frank, 477 F.2d 467, 479 (5th Cir.), *cert. denied*, 414 U.S. 975 (1973); *Wessel* v. *Buhler*, 437 F.2d 279, 284 (9th Cir. 1971).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
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> * * *
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e), provides:

> "(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a), provides:

"(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

Act of June 25, 1948, c. 646, 62 Stat. 963, 28 U.S.C. § 2106, provides:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Rule 10b-5 under the 1934 Act, 17 C.F.R. § 240.10b-5, provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

Rule 10b-6 under the 1934 Act, 17 C.F.R. § 240.10b-6, provides in pertinent part:

"(a) It shall constitute a 'manipulative or deceptive device or contrivance' as used in section 10(b) of the act for any person, . . .

"(2) Who is the issuer or other person on whose behalf such a distribution is being made . . .

directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his participation in such distribution: *Provided, however,* That this section shall not prohibit . . . (ii) unsolicited privately negotiated purchases, each involving a substantial amount of such security, effected neither on a securities exchange nor from or through a broker or dealer; . . .

* * *

"(b) The distribution of a security (1) which is immediately exchangeable for or convertible into another security, or (2) which entitles the holder thereof immediately to acquire another security, shall be deemed to include a distribution of such other security within the meaning of this section. . . ."